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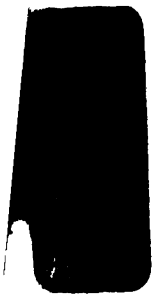

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# WISCONSIN REPORTS

## 104

CASES DETERMINED

IN THE

# SUPREME COURT

OF

# WISCONSIN

SEPTEMBER 26—NOVEMBER 24, 1899.

FREDERIC K. CONOVER
OFFICIAL REPORTER

CHICAGO
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# JUSTICES

OF THE

# SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

---

JOHN B. CASSODAY,
*Ex officio* CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
CHARLES V. BARDEEN,
JOSHUA ERIC DODGE.

---

*Attorney General*, - EMMETT R. HICKS.

*Clerk*, - - - CLARENCE KELLOGG.

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## ERRORS NOTED IN PREVIOUS VOLUMES.

VOL. 103.

**Page 322, line 6. For could not have, read could have.**

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# IN MEMORIAM.

## DEATH OF JUSTICE SILAS U. PINNEY.

On the 3d day of July, 1899, Mr. Henry M. Lewis of Madison addressed the court as follows:

*May it please the Court:* — At a meeting of the Dane County Bar Association held at the court house in the city of Madison on the 3d day of April, A. D. 1899, to take action upon the death of Honorable SILAS U. PINNEY, late Associate Justice of the Supreme Court of Wisconsin, a committee consisting of H. M. Lewis, F. J. Lamb, B. J. Stevens, E. W. Keyes, and George E. Bryant was appointed to prepare a memorial to be presented to the court.

*Memorial of the Dane County Bar Association.*

SILAS U. PINNEY was born in Rockdale, Crawford County, Pennsylvania, March 3rd, 1833, the son of Justin C. and Polly M. (Miller) Pinney. In the spring of 1846 the family removed to Wisconsin and settled upon a farm in what is now the township of Windsor, Dane county. At the time of the removal of the family to Wisconsin the future lawyer and jurist had just passed his thirteenth birthday, and was from thenceforward wholly deprived of school privileges, and whatever of scholarly learning and knowledge of books he acquired were wholly through his own unaided and unguided efforts. He always showed an eagerness for knowledge and a love for books, and while a boy upon the farm he mastered the mathematical course embraced in the usual curriculum of colleges and universities, acquired the art of land surveying, and began the study of the Latin language, which he continued in after life until he acquired a very good knowledge of that language and its literature. At the age of about sixteen he began teaching school in winters, and working upon the farm in summers, and spent all his leisure time in reading and studying. Obtaining a few elementary law books, he began to act as counsel for his neighbors and to practice in justice's court, and the ability he then displayed foreshadowed his future eminence in his chosen profession.

He spent the year 1852-3 in Iowa, studying law, and supported himself largely by surveying. In April, 1853, he became a student in the law office of Vilas & Remington, and in February, 1854, a few days be-



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fore he had reached his twenty-first birthday, was admitted to the bars of the circuit and supreme courts. In May following he became a member of the firm of Vilas, Roys & Pinney, the senior partners being Hon. Levi B. Vilas and Hon. Samuel H. Roys. The firm had a large local business, and the ambitious junior was ready and eager for work and he immediately began to take a prominent part in the trial of cases in the circuit court, where his ability as a lawyer became apparent. Almost from his admission to the bar he became prominent as a lawyer, not only locally but throughout the state. He devoted much time to acquiring knowledge of the correct methods of procedure, and was noted for his correctness as a pleader and his mastery of the details of practice in law and equity in the state and federal courts. Upon the adoption of the Code in 1856, making a radical change in practice, he was one of the first to master the new method, and became an authority on all questions of procedure under it.

In an article in the Green Bag, General E. E. Bryant says:

"It is probably within the bounds of truth to say that no single lawyer in the state has been retained in more cases in number and importance than he. As a lawyer he was remarkably successful, and conducted cases involving a great amount of property with a professional skill and practical sagacity that kept him loaded with retainers and cases. He was several years professor in the College of Law in the State University, but the demands of his practice compelled him to sever this connection. He conducted to successful results much of the important litigation growing out of the 'land grants' made by Congress to aid in the construction of railroads. Out of these and the fickle legislation of the state in disposing of them arose a vast number of perplexing questions to be settled by state and federal courts, and Mr. PINNEY'S labors in this field were extensive and his services were sought by many parties in interest."

It has been truthfully said we believe that Judge PINNEY during his practice at the bar argued more cases in this court than any other lawyer in the state, and this, notwithstanding the fact that during the last ten years or more of his practice the larger part of his business was in the federal courts. Of the one hundred volumes of reports published since the separate organization of this court, his name appears either as an attorney or as associate justice of the court in all but two, a fact, we believe, unparalleled by the experience of any other lawyer in the state of Wisconsin. The first case in which his name appears as one of the counsel is that of *Cecil vs. Barber*, reported in volume 3, Wisconsin Reports, page 297.

In private life, Judge PINNEY was one of the most companionable of men. He was always entertaining, abounding in wit and humor, never hesitated for the right word, was never commonplace, his words aptly chosen and always bearing the stamp and impress of originality, and he was in every respect a man of strong and unique individuality, a

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Death of Justice Silas U. Pinney.

faithful friend, a man of pure life, of the highest intellect, true in all his relations of life as a husband, father, citizen, lawyer, and judge. He was a man of great moral courage, and in all official positions would do what he held was right, regardless of all personal consequences.

As a lawyer he was endowed with a strong and vigorous intellect, discriminating and direct in action, of quick perceptions combined with strong reasoning faculties, and of an untiring industry. These qualities could not fail to bring him into the front rank of his profession in the state and nation, and it is not singular, therefore, that when the venerated chief justice, ORSAMUS COLE, had concluded to retire from his long service in this court, the bar of the state with great unanimity united in calling Mr. PINNEY to the bench. He accepted the call and became a candidate for associate justice in the spring of 1891, taking his seat upon this bench January 4th, 1892, and until his health failed he as a judge met the high expectations of those who had promoted his election, and had, as he deserved, the entire confidence of the bar and the people of the state, and they learned with deep regret of his failing health and of his resignation as an associate justice of this court. He entered upon his judicial duties ripe in experience as a lawyer, and with a mind most thoroughly trained and equipped for successful service on the bench. Careful and painstaking, he brought to his duties every quality of a judge. With a mind quick and subtle in its discrimination, with marvelous familiarity with the law books, and particularly with all the decisions of this court, he was qualified to be a helpful man on any bench, but more especially would his services be helpful and valuable to his associates in this court. The opinions written by him while a member of this court will be an enduring monument to his ability as a jurist, his strong grasp of legal principles, his clear and cogent reasoning.

In 1872 he gathered up the unreported and imperfect work of the territorial supreme court and the first supreme court of the state, and published the same in three volumes of Pinney's Wisconsin Reports.

Failing health compelled him to relinquish his labors here, and on the 9th day of November, 1898, he resigned his position as an associate justice of this court. At the time of his resignation he hoped and expected that a season of rest from his arduous labors would restore him to something of his former strength and vigor, and that he could again to a limited extent, at least, resume the practice of law, but it was not to be. For a time he seemed to rally, but soon his decline became more pronounced and rapid, and in the evening of April 1st, 1899, he peacefully and without fear passed away, almost his last request being that his last look on earth should be upon the face of some old and trusted friend whom he wished to be at his bedside.

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Death of Justice Silas U. Pinney.

Judge PINNEY was naturally conservative in thought and action. In politics he affiliated with the Democratic party, but was independent in his views and in no sense a partisan. While holding with fidelity to the earlier principles of that party, he rejected the Chicago platform of 1896 as innovations upon the party creed which he could not approve.

Judge PINNEY was always a public-spirited man. He had an ardent love for the city of Madison and was sparing of neither time nor money in promoting its welfare. He was always interested in the public schools, and while mayor of the city in 1874 he initiated the movement for a free public library, drew the ordinance creating it, and appointed its first board of directors. It was the second free public library established by municipal authority in the state.

He served the district of which the city of Madison was a part in the Legislative Assembly of 1875, and aside from the offices of an alderman and mayor of the city, and member of the Assembly, he held no elective office until he was elected associate justice of this court.

He was always keenly interested in the early history of the territory and state of Wisconsin, and was wonderfully well informed in regard to the men, lawyers, and judges who had been prominent in territorial times. He early became a member of the State Historical Society, and took much interest in its labors and its accumulations of the early history of the state and territory, and was a curator of that society from 1865 until his death, and his last visit to the capitol was in February preceding his death to attend the meeting of the society to commemorate the semi-centennial anniversary of its organization. Upon reaching the capitol he found that the exertion was too much for his failing strength, and returned to his home.

Judge PINNEY was a man of mental as well as of moral integrity. His mind was so constituted that he could not, and would not if he could, attempt to make "the worse appear the better reason." To be at his best, he must be convinced that truth and justice were with him. His mind had been broadened and enriched by reading, study, and travel, and as he matured in years he rapidly developed in every way, mentally, in his manners, and in his personal appearance, and at the time that he became a justice of this court he was a man of striking and imposing presence, of great dignity, of evident power, and his manners those of a courteous and polished gentleman.

Judge PINNEY was married March 3rd, 1856, to Mary M. Mulliken, a native of Farmersville, Cattaraugus county, New York. One son, Clarence H., was born to them. He died March 31st, 1879, in the twentieth year of his age. An adopted daughter, Bessie, met a tragic death, by the running away of the team attached to the carriage in which she was riding, on the 1st day of June, 1891. To one of his affectionate nature these afflictions caused the most profound grief.

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Death of Justice Silas U. Pinney.

In the career of Judge PINNEY we have another notable example of one rising from poverty, by his own unaided efforts and industry and under almost every possible difficulty and disadvantage, to a position of great eminence and usefulness.

We cannot better close this memorial than by using the words of Judge PINNEY addressed to this court upon the occasion of the memorial exercises in commemoration of the life and services of the late Chief Justice LUTHER S. DIXON:

"In looking back upon his life and life labors, we feel the sorrowing conviction that an eminent man, who had the confidence and respect of his fellows and was of great service to humanity in respect to some of its highest and dearest interests, has been removed from the scenes of earthly activity; that one of the really great men of the state has gone from us to his reward, but leaving us the benefit of his labors, the memory of his noble life, and the light of his clear example."

H. M. LEWIS,
F. J. LAMB,
B. J. STEVENS,
E. W. KEYES,
GEO. E. BRYANT.

## Mr. Lewis continued:

In presenting the memorial of the Dane County Bar Association and in moving that it be spread upon the records of the court, I crave your further indulgence in some personal remarks upon the life and character of Judge PINNEY.

In adopting the profession of law he did not mistake his calling. He had all the natural qualifications for success as a lawyer. With a strong and vigorous intellect, indomitable industry, courage, and confidence in himself, he could not help succeeding. Without the benefit of schools, without influential friends, and unaided, almost from his admission to the bar he forced his way to the front rank of his profession, and for forty years easily held his place among its leaders in the state and nation.

Born with a disordered nervous system, which at times caused him great mental and physical distress, and which accounted for many of the eccentricities apparent in his manner and conduct, and often caused him to be irritable, yet by force of will he in a large measure conquered the infirmity and succeeded where others would have broken down and failed.

He was a true and faithful friend. From an uninterrupted friendship lasting nearly fifty-three years, and from my experience and observation of men, I think I can truthfully say that he was remarkably true and faithful in his friendships. He was ardent in his attachments and disposed to cover with a mantle of charity the faults of others. He loved

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comradeship and intercourse with his fellow-men. Those who knew him will remember his hearty greeting of old acquaintances and the evident pleasure he derived from seeing them. He was of a generous nature, his heart and purse ever open to every worthy object of charity, and he had an especial sympathy for the old settlers of the state, large numbers of whom he personally knew, and the pathway to the tomb of many an old pioneer was made smoother and pleasanter by his generous benefactions.

In the trial of cases he attended strictly to the business in hand, to the orderly and logical presentation of the facts and law of the case, and no trick or maneuver of the opposing counsel could divert him from his object. He never talked to the spectators, never seemingly cared how he impressed them. In his arguments he was terse and vigorous in expression, clear and lucid in statement. He was quick to act, to seize any advantage afforded him by the mistakes or blunders of the opposing counsel, rich in resources, fully conversant with the law and facts applicable to his case. He possessed remarkable powers of sarcasm, and when provoked used these powers with scathing effect upon opposing counsel, party, or witness, as the case required. Though easily irritated and angered, he did not bear malice, but his irritation and anger passed with the occasion that provoked them. He preserved almost to the last much of the cheerful and sportive spirits of youth. When he could escape the anxious cares of professional life, and with congenial comrades seek the sports of forest and stream, he became a boy again in the exhilaration of his spirits.

Judge PINNEY had his faults, but they were mostly excrescences incident to physical infirmities, want of early culture and discipline, crudities and eccentricities of manner in his early life, but not a part of the real man. The real man was strong, manly, and physically, morally, and intellectually great, generous, and, with all his seeming brusqueness, with a heart as tender and sympathetic as a woman's. He no doubt prized the applause and approval of his fellow-men, but he never seemed to seek their approbation, — never "crooked the pregnant hinges of the knee where thrift might follow fawning." He pursued his duties as a lawyer and as an official, apparently unmindful whether the world would approve or condemn. It is an old lesson, but yet largely unlearned by public men, that this is the surest way to reach the popular heart. So the man often brusque with his fellows, who seemed never to seek popular approbation, died universally respected and mourned by all the people of this great commonwealth.

He was a great reader, and whatever he read his remarkable memory retained. He was especially interested in biography and history. I do not think that he studied literature for its own sake, but he read books

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Death of Justice Silas U. Pinney.

for the information and wisdom which they could give him. As is well known, he traveled much abroad, and he was especially interested in places of historic interest, and when in London he visited the haunts of those whose lives he had read and with whose histories he was familiar. He loved to sit in the old public room where Dr. Johnson was accustomed to assemble with his companions, and try to recall and bring to his fancy the scenes as they occurred in the days of the old Doctor. He took great interest in visiting the courts of England and of other European countries, to observe their manner of procedure, and upon one occasion he visited the House of Lords during the hearing of an appeal, and was wont to describe the scene with great interest and vividness; and he was particularly pleased from the fact that in one of the interested parties listening to the arguments he discovered an old acquaintance who had formerly resided in Madison.

As is well known to all who had known him for many years, as he matured in years the awkwardness and crudities of his early years disappeared, and he became a man of impressive presence, one to attract attention in any place or assembly of men.

Genuine, frank, and outspoken, scorning to "assume a virtue if he had it not," he detested sham, cant, and every false pretense.

It can be truly said of him that the world was better for his having lived in it.

Remarks were also made by Mr. Edwin E. Bryant of Madison and Mr. F. C. Winkler of Milwaukee, but no record of them has been preserved.

On behalf of the court Mr. Justice WINSLOW responded as follows:

To speak of the qualities of the distinguished dead with due appreciation and at the same time with simple truthfulness is ever a difficult task; and doubly difficult does the task become when the intimate companionship of years has been suddenly severed and one mourns the rude breaking of the ties of long and loving friendship. And thus I undertake the duty assigned me today with some misgiving lest the love and respect which I shall always feel for Judge PINNEY should lead me to an exaggerated estimate of those noble qualities of his head and heart which call for no exaggeration but only for truthful statement. He whom we mourn today would wish no eulogy save the truth, his simple and straightforward nature would reject anything more than this. And when I speak of love and intimate companionship I use no mere form of pleasant words.

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Death of Justice Silas U. Pinney.

Few can fully appreciate the closeness of the relations which necessarily exist between the members of an appellate court. Day after day, week after week, and month after month they are and must be in close fellowship, meeting the same difficulties and solving the same problems. Their mental processes and methods of work may be entirely dissimilar, but their companionship is constant, their work along the same lines, and their thoughts in the same channels whether the instant task be the consideration of arguments, the active attrition of minds in the consultation room, or the framing of the opinion which shall express the decision of the court. There can be no successful shams, no concealment of mental or moral qualities here; the whole character must come forth, and an erroneous estimate of the man by his fellows is well-nigh impossible.

How fully and completely Judge PINNEY met this supreme test of character we who labored with him upon this bench can testify from personal experience and you who knew and labored with him at the bar can well judge from your knowledge of the man and the lawyer. For myself, I deem my service with him here as a rare privilege, the recollection of which I shall cherish as perhaps the choicest memory of my professional life. It is a great thing to say of a man that he possessed a mind contact with which would improve any mind, but I feel that this may be truthfully said of Judge PINNEY, and as we now do him this last sad honor we may with profit to ourselves inquire why this was so and what was the secret of his greatness. How came this farmer's boy whose early life was a constant struggle with adversity, who had no college course and no advantages, who made his way single-handed and alone,— how came he to attain that intellectual and professional eminence which we so freely accord to him? Natural abilities he had, and of a high order. He had a comprehensive, vigorous, and logical mind, an unfailing memory, and an insatiable thirst for knowledge, but these natural gifts would have availed him little had it not been for his untiring industry. It has been truly said that

"The heights by great men reached and kept
Were not attained by sudden flight,
But they, while their companions slept,
Were toiling upward in the night."

Thus it was with Judge PINNEY. He traveled no royal road to greatness; no easy and flowery path was his; every step was the result of labor; every advance marked difficulties manfully met and overcome by means of an industry as strenuous as it was incessant.

To such a man with such industry great success was sure to come in its own good time. It might not, nay it could not, be sudden and meteoric, but it was sure to be solid and enduring when it did come.

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Death of Justice Silas U. Pinney.

Nor was his eminence professional eminence alone; his was no narrow mind which confined itself to the contracted limits of the practice and knew nothing beyond. His mental growth was symmetrical. As he grew and developed into the great lawyer he found time also to lay by rich stores of general information and make broad and comprehensive researches in historical, literary, and scientific fields. Deprived of a college training, he supplied the lack by extensive and judicious reading, and later by travel, with such success that his conversation upon general subjects was as instructive as it was delightful.

How he delighted in his library,

"the sequestered nooks,
And all the sweet serenity of books."

Often have I called upon him when he was confined at home by some slight indisposition, and found him in his library sitting before a bright fire and deep in some historical or scientific work from which he would turn to greet me with a cordial smile and a face aglow with the intellectual feast which he was enjoying to the full. And then how brilliant was his conversation; now instructive, now humorous, and again replete with anecdotes of travel or of the early history of the state with which his memory was richly stored. The recollection of those delightful conversations is with me now and will remain with me always.

I have said that Judge PINNEY possessed a comprehensive and vigorous mind, but it was not only this, it was an *honest* mind. He grasped a subject and reasoned upon it from premise to conclusion without paltering or shrinking, and he faced the result, unwelcome though it might be, without fear. He played no tricks with his reasoning powers, nor strove to avoid the logical result of his mental processes. He was in a word intellectually honest, and this intellectual honesty was supplemented by a corresponding moral honesty. I do not mean by this a mere financial honesty which renders dollar for dollar and exacts the same in return, but that higher integrity of character which loves truth because it is truth, and scorns a dishonest action because a dishonest thought has no abiding place in the heart. We have need of more of such honesty. In these days of money-getting, when many turn the profession into a mere business and use it simply as a road to wealth, with slight regard whether the means used be honest or not, a character of this kind shines forth like a beacon light over the waters of a troubled sea. From such lives the young practitioner may learn that there are things of infinitely greater value than the fee earned by doubtful methods, and that lasting honors, even in a time-serving and money-worshiping age, are won by the man of integrity and not by the brilliant professional trickster.

We cannot all possess the powers of mind which he possessed, but we can be intellectually and morally honest if we will.

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Death of Justice Silas U. Pinney.

The mental endowment which marked Judge PINNEY chiefly above his fellows at the bar was his memory. This was a constant marvel to me. Frequently when engaged in the discussion of a legal question upon which he had made no previous preparation he would say, "This principle was decided in such a case," naming the case and the volume in which it was to be found, and go to the shelf and take down the book and read from it, without apparently appreciating that he had done anything out of the ordinary. The value of such a memory to the lawyer or the judge is well-nigh inestimable. It was a natural gift, but it was strengthened and improved by constant exercise during his whole professional life.

When Judge PINNEY came to this bench in obedience to the call of the people his natural and acquired powers were at the very full and he stood confessedly in the front rank of the profession. With that industry which was the keynote of his life he devoted those powers completely and without reserve to the performance of his duties, and thereby rendered a service to the state, to the law, and to the profession which it would be hard to overestimate. From a pecuniary point of view it was a step which involved a heavy loss, but he saw duty before him and he grudged not the sacrifice; for the sense of duty pursued him ever. Often, when oppressed with the weight of his labors and when he felt his strength failing, he would express his desire and determination to serve out his term at any cost and thus fulfill his contract with the people, which he regarded as, in a sense, a sacred obligation. But it was not to be. More and more heavily there descended upon him physical pain and weakness, and too late he saw that it was impossible for him to carry out the wish of his heart. And so he left the bench, hoping to recuperate his shattered strength and spend some years in comfort. But this also was denied him. At first there seemed to come, with the release from toil, a little brightening of the physical powers, but it was only temporary; the relief had come too late; a lifetime of labor had broken down his strength beyond the power of recovery, and the seal of death was upon him. Gradually he came to know that this was so, but the approach of death possessed no terror for him. He seemed to experience a feeling of relief at the approaching release from the pain and weakness which had been his companions for so long, and with the fearless confidence which marked his life he walked through the valley of the shadow of death fearing no evil.

He leaves as a legacy to us the record of his life. It is the inspiring record of the life work of a great and just man. Such a record must and will live; it cannot die.

"Only the actions of the just
Smell sweet and blossom in the dust."

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Death of Judge John E. Mann.

## DEATH OF JUDGE JOHN E. MANN.

Mr. A. L. Cary, of Milwaukee, then said:

*May it please the Court:*— It has devolved upon me to present to this honorable court the memorial adopted by the Milwaukee Bar upon the occasion of the recent death of Hon. JOHN E. MANN.

In the performance of this duty sorrow and pleasure are commingled: sorrow that he, whom we so much respected and honored, has gone from us forever, and pleasure in the commemoration of a life that so nearly marked the perfect man. The contemplation of such a life is ever fraught with satisfaction and pleasure, and we should weave into our own lives the worthy lessons to be gathered from it.

Human life and intelligence are the highest manifestations of the creative power, and when developed, educated, and refined as they may be they command the admiration of men and the approbation of Deity.

The current of Judge MANN'S life was so even and peaceful that it attracted but limited notice in the vast current of human affairs in which he moved; yet he pursued his way with such patient and persistent industry and force that he far outstripped many others who were endowed with greater natural abilities.

His early history was that of many an American boy. He was reared upon the farm, which undoubtedly gave him that physical vigor and strength which served him so well during his long and busy life. He received his rudimentary education in the local schools of his native county, Schoharie, in the great state of New York, and afterwards with the zeal and push of a true American youth worked his way through Union College, Schenectady, at the time it was presided over by Dr. Nott and when it was considered one of the leading educational institutions of the country. From here he went to the law office, where he served the long apprenticeship in legal training that was then required in order to be admitted to practice in the courts of New York. When Judge MANN studied for his profession, lawyers were not made by any hot-house process. It was only after hard and patient study and drilling in the office of some practicing lawyer for a term of three to four years that the candidate was deemed qualified for admission to our great and noble profession. Admitted to the bar at Utica in 1847, he commenced the struggle for advancement in his profession in his native county, but after the lapse of a few years he came to Wisconsin and located at West Bend, Washington county. Here he soon gained the confidence of the people to such an extent that in 1859 he was elected circuit judge to fill a vacancy caused by the resignation of Judge LARRABEE, and in

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1860 was re-elected for a full term. Upon the expiration of this term he moved to Milwaukee and identified himself with the Milwaukee bar, and actively practiced his profession until he was appointed county judge in 1874, which office he held continuously from that time until his death, covering a period of twenty-five years.

The instances are very rare where one man, by the popular vote of the people, has been retained in a judicial position so important and attractive as that occupied by Judge MANN for the length of time which he occupied it. The vast and important probate business committed to the charge of the county judge of Milwaukee county has rendered the office one of the most important and responsible in the state, and during more than half the period that Judge MANN was its incumbent the court over which he presided had a civil jurisdiction practically concurrent with that of the circuit court. He commanded the confidence of the people, and this without any great degree of personal popularity. He wholly lacked that personal magnetism which sways persons and communities. It was his unswerving integrity, his faithfulness to duty, and his intelligent discharge of all his official duties which commanded the respect and confidence of the people. He seemed to be eminently fitted for a judicial position.

As judge he was uniformly kind, considerate, patient, and attentive. He never prejudged the question presented for his determination, but patiently listened to its presentation, and then gave it careful consideration before reaching a conclusion. What he may have lacked in special gifts he made up by an untiring industry. His judicial duties were always faithfully, intelligently, and unswervingly discharged. He was true to every trust committed to his care, and lived a blameless, upright, and useful life.

In commemoration of such a man I now ask this honorable court to cause to be spread upon its records the memorial adopted by the Milwaukee Bar, which I now present for that purpose.

*Memorial of the Milwaukee Bar.*

Actuated by a feeling deeply implanted in the human breast, and following a time-honored custom of our fraternity, we again meet, as we have often met before, to pay a final tribute to a departed and highly honored friend.

JOHN E. MANN, for many years a member of our bar, and for a quarter of a century the judge of our county court, is no more. Leaving his home at an early morning hour to resume his seat upon the bench, eagerly bent, as ever, upon the discharge of his judicial duty, an attack of paralysis called a sudden halt, and by evening of the same day, May 1st, death came to him, and Judge MANN passed from earthly life into that great unknown future which is assigned to us all.

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## Death of Judge John E. Mann.

His death came suddenly, but to many of us not unexpectedly. Those who had known him in earlier days could readily perceive the weight of growing years. At the age of seventy-eight we do not assume that a long lease of life and an extended period of practical usefulness are still before us. Clear and bright as our faculties may be, we cannot well ignore the weakness of the flesh and that boundary which the laws of nature invariably impose upon all earthly ambition.

Judge MANN seemed to be an exception to this rule. To strangers his age was not apparent. His robust frame, erect figure, easy, steady gait, accustomed quiet but graceful demeanor, did not indicate the increasing burden of advancing years.

Although he had passed far beyond the line of three score years and ten, but two short years ago the people of this county again elected him to the high office, to serve a seventh successive term, a mark of confidence and respect very rarely bestowed.

Born in the rural districts of Schoharie county, New York, on March 4th, 1821, the early years of JOHN E. MANN were spent on the farm. The local schools of his native county afforded but meager opportunity for schooling, and were followed by an academic course at Williams and later on at Union College, where he graduated in 1843. His legal training was confined to the law office. He was admitted to the bar at the general term of the superior court at Utica in 1847. For the next seven years we find the young lawyer trying to catch public attention and to secure a foothold at his old home, until finally he concluded to intrust his future to the growing West. In 1854 he settled at West Bend, forming a partnership with L. F. Frisby, who became well known as attorney general of this state.

Elected to the circuit bench in 1859 to fill a vacancy caused by the resignation of Judge LARRABEE, Judge MANN soon became a favorite with the bar and public, and was elected in 1860 for a full term. When a candidate for re-election in 1866, he was defeated by Judge PULLING, and moved to Milwaukee.

In partnership with F. W. v. Cotzhausen, he here practiced law with great success until his elevation to the bench of the county court in 1874, which position he has held continuously for twenty-five years. Until 1888 he divided as county judge the judicial labor with the circuit court; but on the organization of the superior court his sphere of action became confined to the transaction of probate business, in which branch of law Judge MANN reached the climax of his public career.

A writer in the Bench and Bar says of him:

"The characteristics of Judge MANN are those of strong common sense, stern integrity, unremitting industry; and with broad and comprehensive views on general subjects is accustomed to form conclusions with care and precision. He is a close student, and is eminently sound

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and well grounded in the fundamental principles of law, which he applies, in the course of his official duties, with discreet impartiality.

"With brevity in speech, unobtrusive and courteous in demeanor, he is firm in his convictions, strong in his friendships, and an honest man."

We believe the above to be fairly characteristic, and transcribe the same on this record. As an advocate at the bar Judge MANN was not a great success. He lacked the fluency of speech and facility of expression which are deemed so essential to forensic life, and he very much disliked the nervous strain of professional struggles.

As a man of affairs and office lawyer he readily gained the good-will of clients. He was not a man of great genius, but kind and agreeable to all those with whom he came in contact, of a practical rather than a literary mind; of strong good sense; a man of clear judgment and of firm will. His very appearance inspired confidence.

As a judge, whether presiding at law or in chancery, Judge MANN could not help becoming a favorite with the general public. There was nothing particularly magnetic about him, but he was industrious and painstaking. His integrity and impartiality were never questioned either by the attorneys or suitors. No judge ever proved a more patient listener. Judge MANN would rarely interrupt an argument by questions, and still less assume to lead counsel in the trial of a case into foreign channels. With him lawyers were always permitted to present their case in their own way, and as a result but few judges can point to a record on appeal equal to that of Judge MANN. However, it is in the probate court that our friend achieved his highest reputation. Truly it has been said that "with him every phase of probate practice had become second nature." Regular as clock-work, exact and methodical in all his ways, industrious and painstaking almost to the extreme, he brought to bear every energy of his mind to a thorough examination of the subject matter before him, and there never was a person who displayed a more laudable ambition and spent more hours of his time in the discharge of public duties.

Of his private life and relations others may speak. Who shall estimate the loss to his wife, family, and friends? We only know that in the death of JOHN E. MANN the bar and public have lost an honest, upright judge. Until his last moments he proved a faithful and devoted public servant.

All honor to his memory. He will rest in peace.

F. W. v. COTZHAUSEN,
DAVID S. ORDWAY,
JOSEPH G. DONNELLY,
GEO. H. NOYES,
FRED SCHEIBER.

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Death of Judge John E. Mann.

Mr. Justice MARSHALL, for the court, responded:

The court is sensible of the propriety of some official recognition here of the long and distinguished public career of the subject of the memorial address to which we have just listened. The application that such recognition be accomplished by admitting such memorial to the records of this court receives the favorable consideration now expressed, unaccompanied by any words of eulogy or biography. The presentment made at the bar fittingly covers the subject. Nothing further is necessary. The work has been done by those who knew the deceased jurist in social, professional, and official life with that intimacy requisite to enable them to speak intelligently and justly of him, properly portraying the man as he was, in this last official tribute paid to his memory.

Judge MANN, it is said, admired men only for their real worth, mere seeming and pretense, through which he easily saw the real man, counting for nothing; and by the same standard he doubtless desired to be measured and known in history. The words that have been spoken at the bar follow closely that line, doing merited honor to one of the significant figures in the history of the state; a person who ably served its people in high public stations for the greater part of a busy and exceptionally long life, and with the strictest fidelity to their every duty.

As speak the memorial and accompanying remarks, so let the record of these proceedings be made up. Current history, known to all, forbids the verity of such record being questioned by present generations, and to those that come after it will speak the words of truth because, thus it is written, with the sanction of the court.

The memorial and accompanying remarks will be duly entered upon the journal of the court with our responsive words, to be hereafter embodied in the official publication.

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# CASES DETERMINED

AT THE

# August Term, 1899.

## MACK, Guardian, Appellant, vs. PRANG, imp., Respondent.

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104 608

104 1
108 547

104 1
45 LRA 400n
845 LRA 407
47 LRA 417n

*June 5 — September 26, 1899.*

*Duress: Threats of imprisonment of husband: Negotiable instruments:* Bona fide *purchaser: Guardians.*

1. Threats of an employer to prosecute an employee for embezzlement and send him to jail unless his wife would execute a note and a mortgage of her own property to secure her husband's debt constituted duress rendering voidable the note and mortgage so executed where the will of the wife was so overcome by the threats that the execution of the instruments was not her voluntary act.
2. One of two joint guardians of an infant, being unable to account for money of the ward which he had received, resigned his guardianship and turned over a note and mortgage, payable to him but not yet due, to the remaining guardian, who received them in payment *pro tanto*, at their face value, of the indebtedness of the payee to the ward. *Held*, that the remaining guardian thereby became a *bona fide* holder for value of the note.
3. The defense that negotiable paper was executed under duress by threats of imprisonment of a relative is not available against a *bona fide* purchaser before maturity.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

This is an action of foreclosure of a note and mortgage for $2,500 executed June 10, 1892, by the defendant *Marie J. Prang* and her husband, William Prang, and delivered to one Herman S. Mack, and assigned by him to the plaint-



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iff as guardian of Alma Mack, December 19, 1894, and before maturity. The mortgage covered real estate in the city of Milwaukee, which was the property of the defendant *Marie Prang*, and both note and mortgage were given to secure payment of an indebtedness then owing by the husband, William Prang, to Herman S. Mack. The defense was that both note and mortgage were executed by the defendant *Marie Prang* under duress, consisting of threats of imprisonment of her husband, William Prang. The action was referred to W. J. McElroy, Esq., to hear, try, and determine the same.

The referee found that prior to the 10th of June, 1892, William Prang was a traveling salesman in the employ of H. S. Mack & Co., of Milwaukee, and that at said time he had appropriated to his own use, of the moneys of said firm, more than $5,000; that during three days prior to and on the 10th day of June, 1892, Herman S. Mack, directly and through the defendant William Prang, threatened *Marie* that, if she did not execute the note and mortgage in question, he would prosecute her husband, William Prang, and have him sent to prison, and that *Marie* executed said note and mortgage only under the fear that, if she refused to execute the same, her husband would be prosecuted and sent to prison; that no money was ever paid or authorized to be paid by the defendant *Marie Prang* upon said note and mortgage, nor had she knowledge of any payment being made thereon; that the amount due on the note from William Prang to the plaintiff amounted to the sum of $3,321.25. And as conclusions of law the referee found that the defendant *Marie Prang* was entitled to judgment of dismissal of the action, with costs, and that, as to her, said note and mortgage be canceled, and that the plaintiff was entitled to judgment against William Prang for the amount of the note with costs.

Upon motions being made by the plaintiff to modify said

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report, and by the defendant to confirm the same, the court modified the findings by adding a finding, in effect, that the plaintiff was and is a *bona fide* purchaser, for value and before maturity, of the note and mortgage in question, and also that at the time of the execution of said mortgage the will of said *Marie Prang* was overpowered by said threats, and that the execution of said mortgage by her was not her voluntary act. Thereupon judgment was entered in favor of the defendant *Marie J. Prang*, setting aside the said note and mortgage as to her, and from that judgment this appeal is taken.

For the appellant there was a brief by *Miller, Noyes, Miller & Wahl*, and oral argument by *Geo. H. Noyes*. To the point that a threatened lawful arrest or prosecution which does not imply harsh or unusual use of a criminal process, when no warrant has been issued and there is no danger of the threat being immediately carried out, does not constitute duress, they cited *Wolff v. Bluhm*, 95 Wis. 257–259; 6 Am. & Eng. Ency. of Law, 64, 69; *Compton v. Bunker Hill Bank*, 96 Ill. 301; *Nealley v. Greenough*, 25 N. H. 325; *Alexander v. Pierce*, 10 N. H 494; *Eddy v. Herrin*, 17 Me. 338; *Harmon v. Harmon*, 61 Me. 227; *Higgins v. Brown*, 78 Me. 473; *Hilborn v. Bucknam*, 78 Me. 482; *Taylor v. Jaques*, 106 Mass. 291; *Landa v. Obert*, 45 Tex. 539.

For the respondent there were briefs by *Sylvester, Scheiber & Orth*, and oral argument by *Frederick Scheiber*. They contended, *inter alia*, that duress is available as a defense against a *bona fide* purchaser for value before maturity. Story, Bills, § 185; 1 Daniel, Neg. Inst. §§ 857, 858; 1 Parsons, Notes & Bills, 276; *Palmer v. Poor*, 121 Ind. 135; *Barry v. Equitable L. A. Soc.* 59 N. Y. 587; *Hatch v. Barrett*, 34 Kan. 233; Thompson, Bills (Wilson's ed.), 62; *Duncan v. Scott*, 1 Campb. 100; Tiedeman, Comm. Paper, § 287; *Berry v. Berry*, 57 Kan. 691; *Earle v. Norfolk & N. B. H. Co.* 36 N. J. Eq. 192; 10 Am. & Eng. Ency. of Law (2d ed.), 327; *Jordan v. Elliott*,

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12 Weekly Notes Cases, 56; *Clark v. Pease*, 41 N. H. 414; *Walker v. Ebert*, 29 Wis. 194; *Kellogg v. Steiner*, 29 Wis. 626; *Tisher v. Beckwith*, 30 Wis. 55; *Andrews v. Thayer*, 30 Wis. 228; *Butler v. Carns*, 37 Wis. 61; *Chipman v. Tucker*, 38 Wis. 43; *Roberts v. McGrath*, 38 Wis. 52; *Griffiths v. Kellogg*, 39 Wis. 290; *Bowers v. Thomas*, 62 Wis. 480. Appellant is not a *bona fide* holder for value of the mortgage in question. *Martin v. Davis*, 80 Wis. 378; *McDonald v. Fire Asso.* 93 Wis. 348; Schouler, Ex'rs & Adm'rs, § 400; *Bowman v. Van Kuren*, 29 Wis. 209 (217); *Black v. Tarbell*, 89 Wis. 390; *Burnham v. Merchants' Exch. Bank*, 92 Wis. 277; Woerner, Guardianship, § 53.

The following opinion was filed June 22, 1899:

WINSLOW, J. It is admitted that this was a mortgage given by the wife upon her own property to secure the debt of her husband, but it is claimed by the appellant that there was not sufficient evidence to establish the defense of duress. We cannot agree with this contention. The defendant William had been for several years a traveling salesman for Herman S. Mack, the original mortgagee, and was short in his accounts to the amount of $5,000. The evidence of both *Marie* and William Prang was to the effect that both Mack and his bookkeeper personally came to see *Mrs. Prang*, and threatened to prosecute William for embezzlement, and send him to jail, unless she would give the mortgage; that she at first refused, and that they gave her a day or two to think the matter over; that she was greatly excited and alarmed at these threats, and had fainting spells both before and after she executed the mortgage, and that she only executed it to prevent her husband being sent to jail. It is true, this testimony was substantially contradicted by Mack and the bookkeeper, but we cannot say that the findings on this point were against the weight of the evidence. Facts substantially similar to these have frequently been held to constitute du-

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ress which renders voidable a security or contract executed under their influence. *McCormick H. M. Co. v. Hamilton*, 73 Wis. 486; *City Nat. Bank v. Kusworm*, 88 Wis. 188, and cases cited in opinion. It is true that the will of the person making the contract must be overcome so that the act is not his voluntary act, but that fact is found in the present case, and upon evidence which we think sufficient. Nor is this doctrine in any way in conflict with what was said by this court in *Wolff v. Bluhm*, 95 Wis. 257. That was a case, as distinctly stated in the opinion, where the evidence showed that the will was not overcome, and the party acting under the alleged duress was free to act as he chose, and only acted after consulting his friends and neighbors. It was also there said that in order to constitute duress "the threat must be of such a nature, and made under such circumstances, as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by such person while in such condition."

The fact of duress being found upon sufficient evidence, two further questions require consideration, namely: Was the plaintiff a *bona fide* holder? and, If so, does such fact cut off the defense of duress?

The court below found that the plaintiff was a *bona fide* holder before due, and this was plainly correct. The facts were these: Herman Mack and *Bertha Mack*, the plaintiff, were joint guardians of Alma Mack, an infant. Herman received $10,000 of the property of Alma, and in December, 1894, was in failing circumstances and unable to account for it. Thereupon he resigned his guardianship, which resignation was accepted by the county court, leaving *Bertha* sole guardian. After resigning, he turned over this note and mortgage to *Bertha*, who received it in payment *pro tanto*, at its face value, upon Herman's indebtedness to his ward. It had not matured when thus sold to *Bertha*. No reason is perceived why the remaining guardian might not

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receive the mortgage in payment of the former guardian's liability to the ward,—at least, to the amount of its actual value. A transfer of negotiable paper before due in payment of a pre-existing debt constitutes the purchaser a *bona fide* holder. *Shufeldt v. Pease*, 16 Wis. 659; *Kellogg v. Fancher*, 23 Wis. 21.

There is some conflict in the authorities upon the question whether the defense of duress by threats can be successfully urged against a *bona fide* holder for value of negotiable paper, but the better opinion and weight of authority is that such defense stands upon the same footing as other defenses which may be made as between the original parties but are cut off when the paper reaches the hands of a *bona fide* holder. *Fairbanks v. Snow*, 145 Mass. 153; *Farmers' & M. Bank v. Butler*, 48 Mich. 192; *Clark v. Pease*, 41 N. H. 414; *Beals v. Neddo*, 1 McCrary, 206; *Martineau v. McCollum*, 3 Pin. 455; 4 Am. & Eng. Ency. of Law (2d ed.), 334. Duress which consists of threats of imprisonment of a husband or a child is a species of fraud, which renders the contract made under its influence voidable only, and not void. *City Nat. Bank v. Kusworm*, 91 Wis. 166. If it be simply a voidable contract, then it follows naturally that, when the contract consists of negotiable paper, the defense is cut off by transfer to a *bona fide* purchaser before maturity, in the same manner that other defenses upon the ground of fraud are cut off. The conclusion is that the plaintiff was entitled to a judgment of foreclosure notwithstanding the duress.

*By the Court.*—Judgment reversed, and action remanded with directions to enter the usual judgment of foreclosure and sale.

A motion for a rehearing was denied September 26, 1899.

As to contracts procured by threats of prosecution of a relative, see note to *City Nat. Bank v. Kusworm* (88 Wis. 188), in 26 L. R. A. 48; also *Loud v. Hamilton* (Tenn.), 45 L. R. A. 400.—REP.

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MELMS and others, Appellants, vs. PABST BREWING COMPANY, Respondent.

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*June 6 — September 26, 1899.*

*Waste: Changes enhancing value.*

1. A large dwelling-house built in 1864 in the city of Milwaukee had, as a result of the growth and development of the city, become surrounded by factories and railway tracks. It stood isolated, upon just enough ground to support it, from twenty to thirty feet above the level of the street, and was absolutely undesirable as a residence and incapable of any use as business property. In 1891 and 1892 the owner of a life estate, who stood in no contract relation to the reversioners, removed the building and graded down the land to about the level of the street, thereby largely enhancing the value of the property. *Held*, that this did not constitute actionable waste.
2. When there has occurred a complete and permanent change of surrounding conditions, which has deprived property of its value and usefulness as previously used, the question whether a life tenant, not bound by contract to restore the property in the same condition in which he received it, has been guilty of waste in making changes necessary to make the property useful, is a question of fact for the jury under proper instructions, or for the court when the question is tried by the court.

APPEAL from a judgment of the circuit court for Milwaukee county: GEO. CLEMENTSON, Judge. *Affirmed.*

This is an action for waste, brought by reversioners against the defendant, which is the owner of an estate for the life of another in a quarter of an acre of land in the city of Milwaukee. The waste claimed is the destruction of a dwelling-house upon the land, and the grading of the same down to the level of the street. The complaint demands double damages, under sec. 3176, Stats. 1898.

The quarter of an acre of land in question is situated upon Virginia street, in the city of Milwaukee, and was the homestead of one Charles T. Melms, deceased. The house thereon was a large brick building built by Melms in the year 1864,

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and cost more than $20,000. At the time of the building of the house, Melms owned the adjoining real estate, and also owned a brewery upon a part of the premises. Charles T. Melms died in the year 1869, leaving his estate involved in financial difficulties. After his decease, both the brewery and the homestead were sold and conveyed to the *Pabst Brewing Company*, but it was held in the action of *Melms v. Pabst B. Co.* 93 Wis. 140, that the brewing company only acquired Mrs. Melms's life estate in the homestead, and that the plaintiffs in this action were the owners of the fee, subject to such life estate. As to the brewery property, it was held in an action under the same title, decided at the same time, and reported in 93 Wis. 153, that the brewing company acquired the full title in fee. The homestead consists of a piece of land ninety feet square, in the center of which the aforesaid dwelling house stood; and this parcel is connected with Virginia street on the south by a strip forty-five feet wide and sixty feet long, making an exact quarter of an acre.

It clearly appears by the evidence that after the purchase of this land by the brewing company the general character of real estate upon Virginia street about the homestead rapidly changed, so that soon after the year 1890 it became wholly undesirable and unprofitable as residence property. Factories and railway tracks increased in the vicinity, and the balance of the property was built up with brewing buildings, until the quarter of an acre homestead in question became an isolated lot and building, standing from twenty to thirty feet above the level of the street, the balance of the property having been graded down in order to fit it for business purposes. The evidence shows without material dispute that, owing to these circumstances, the residence, which was at one time a handsome and desirable one, became of no practical value, and would not rent for enough to pay the taxes and insurance thereon; whereas, if the

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property were cut down to the level of the street, so as to be capable of being used as business property, it would again be useful, and its value would be largely enhanced. Under these circumstances, and prior to the judgment in the former action, the defendant removed the building and graded down the property to about the level of the street, and these are the acts which it is claimed constitute waste.

The action was tried before the court without a jury, and the court found, in addition to the facts above stated, that the removal of the building and grading down of the earth was done by the defendant in 1891 and 1892, believing itself to be the owner in fee simple of the property, and that by said acts the estate of the plaintiffs in the property was substantially increased, and that the plaintiffs have been in no way injured thereby. Upon these findings the complaint was dismissed, and the plaintiffs appeal.

For the appellants there were briefs by *Bloodgood, Kemper & Bloodgood*, attorneys, and *Francis Bloodgood*, of counsel, and oral argument by *J. B. Kemper* and *Francis Bloodgood*.

For the respondent there were briefs by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *F. C. Winkler*.

The following opinion was filed July 3, 1899:

WINSLOW, J. Our statutes recognize waste, and provide a remedy by action and the recovery of double damages therefor (Stats. 1898, sec. 3170 *et seq.*); but they do not define it. It may be either voluntary or permissive, and may be of houses, gardens, orchards, lands, or woods (Id. sec. 3171); but, in order to ascertain whether a given act constitutes waste or not, recourse must be had to the common law as expounded by the text-books and decisions. In the present case a large dwelling house, expensive when constructed, has been destroyed, and the ground has been graded down, by the owner of the life estate, in order to make the property serve business purposes. That these acts would consti-

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tute waste under ordinary circumstances cannot be doubted. It is not necessary to delve deeply into the Year Books, or philosophize extensively as to the meaning of early judicial utterances, in order to arrive at this conclusion. The following definition of waste was approved by this court in *Bandlow v. Thieme*, 53 Wis. 57: "It may be defined to be any act or omission of duty by a tenant of land which does a lasting injury to the freehold, tends to the permanent loss of the owner of the fee, or to destroy or lessen the value of the inheritance, or to destroy the identity of the property, or impair the evidence of title." In the same case it was also said: "The damage being to the inheritance, and the heir or the reversioner having the right of action to recover it, imply that the injury must be of a lasting and permanent character." And in *Brock v. Dole*, 66 Wis. 142, it was also said that "any material change in the nature and character of the buildings made by the tenant is waste, although the value of the property should be enhanced by the alteration."

These recent judicial utterances in this court settle the general rules which govern waste, without difficulty, and it may be said, also, that these rules are in accord with the general current of the authorities elsewhere. But, while they are correct as general expressions of the law upon the subject, and were properly applicable to the cases under consideration, it must be remembered that they are general rules only, and, like most general propositions, are not to be accepted without limitation or reserve under any and all circumstances. Thus the ancient English rule which prevented the tenant from converting a meadow into arable land was early softened down, and the doctrine of meliorating waste was adopted, which, without changing the legal definition of waste, still allowed the tenant to change the course of husbandry upon the estate if such change be for the betterment of the estate. Bewes, Waste, 134 *et seq.*, and cases cited. Again, and in accordance with this same prin-

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ciple, the rule that any change in a building upon the premises constitutes waste has been greatly modified, even in England; and it is now well settled that, while such change may constitute technical waste, still it will not be enjoined in equity when it clearly appears that the change will be, in effect, a meliorating change which rather improves the inheritance than injures it. *Doherty v. Allman*, 3 App. Cas. 709; *In re McIntosh*, 61 Law J. Q. B. 164. Following the same general line of reasoning, it was early held in the United States that, while the English doctrine as to waste was a part of our common law, still the cutting of timber in order to clear up wild land and fit it for cultivation, if consonant with the rules of good husbandry, was not waste, although such acts would clearly have been waste in England. Tiedeman, Real Prop. (2d ed.), § 74; Rice, Mod. Law Real Prop. §§ 160, 161; *Wilkinson v. Wilkinson*, 59 Wis. 557.

These familiar examples of departure from ancient rules will serve to show that, while definitions have remained much the same, the law upon the subject of waste is not an unchanging and unchangeable code, which was crystallized for all time in the days of feudal tenures, but that it is subject to such reasonable modifications as may be demanded by the growth of civilization and varying conditions. And so it is now laid down that the same act may be waste in one part of the country while in another it is a legitimate use of the land, and that the usages and customs of each community enter largely into the settlement of the question. Tiedeman, Real Prop. (2d ed.), § 73. This is entirely consistent with, and in fact springs from, the central idea upon which the disability of waste is now, and always has been, founded, namely, the preservation of the property for the benefit of the owner of the future estate without *permanent* injury to it. This element will be found in all the definitions of waste, namely, that it must be an act resulting in permanent injury to the inheritance or future estate.

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It has been frequently said that this injury may consist either in diminishing the value of the inheritance, or increasing its burdens, or in destroying the identity of the property, or impairing the evidence of title. The last element of injury so enumerated, while a cogent and persuasive one in former times, has lost most, if not all, of its force at the present time. It was important when titles were not registered, and descriptions of land were frequently dependent upon natural monuments or the uses to which the land was put; but since the universal adoption of accurate surveys and the establishment of the system of recording conveyances, there can be few acts which will impair any evidence of title. *Doherty v. Allman*, 3 App. Cas. 709; Bewes, Waste, 129, 130, *et seq.* But the principle that the reversioner or remainderman is ordinarily entitled to receive the identical estate, or, in other words, that the identity of the property is not to be destroyed, still remains, and it has been said that changes in the nature of buildings, though enhancing the value of the property, will constitute waste if they change the identity of the estate. *Brock v. Dole*, 66 Wis. 142. This principle was enforced in the last-named case, where it was held that a tenant from year to year of a room in a frame building would be enjoined from constructing a chimney in the building against the objection of his landlord. The importance of this rule to the landlord or owner of the future estate cannot be denied. Especially is it valuable and essential to the protection of a landlord who rents his premises for a short time. He has fitted his premises for certain uses. He leases them for such uses, and he is entitled to receive them back at the end of the term still fitted for those uses; and he may well say that he does not choose to have a different property returned to him from that which he leased, even if, upon the taking of testimony, it might be found of greater value by reason of the change. Many cases will be found sustaining

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this rule; and that it is a wholesome rule of law, operating to prevent lawless acts on the part of tenants, cannot be doubted, nor is it intended to depart therefrom in this decision. The case now before us, however, bears little likeness to such a case, and contains elements so radically different from those present in *Brock v. Dole*, 66 Wis. 142, that we cannot regard that case as controlling this one.

There are no contract relations in the present case. The defendants are the grantees of a life estate, and their rights may continue for a number of years. The evidence shows that the property became valueless for the purpose of residence property as the result of the growth and development of a great city. Business and manufacturing interests advanced and surrounded the once elegant mansion, until it stood isolated and alone, standing upon just enough ground to support it, and surrounded by factories and railway tracks, absolutely undesirable as a residence and incapable of any use as business property. Here was a complete change of conditions, not produced by the tenant, but resulting from causes which none could control. Can it be reasonably or logically said that this entire change of condition is to be completely ignored, and the ironclad rule applied that the tenant can make no change in the uses of the property because he will destroy its identity? Must the tenant stand by and preserve the useless dwelling-house, so that he may at some future time turn it over to the reversioner, equally useless? Certainly, all the analogies are to the contrary. As we have before seen, the cutting of timber, which in England was considered waste, has become in this country an act which may be waste or not, according to the surrounding conditions and the rules of good husbandry; and the same rule applies to the change of a meadow to arable land. The changes of conditions which justify these departures from early inflexible rules are no more marked nor complete than is the change of conditions which destroys

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the value of residence property as such and renders it only useful for business purposes. Suppose the house in question had been so situated that it could have been remodeled into business property; would any court of equity have enjoined such remodeling under the circumstances here shown, or ought any court to render a judgment for damages for such an act? Clearly, we think not. Again, suppose an orchard to have become permanently unproductive through disease or death of the trees, and the land to have become far more valuable, by reason of new conditions, as a vegetable garden or wheat field, is the life tenant to be compelled to preserve or renew the useless orchard, and forego the advantages to be derived from a different use? Or suppose a farm to have become absolutely unprofitable by reason of change of market conditions as a grain farm, but very valuable as a tobacco plantation, would it be waste for the life tenant to change the use accordingly, and remodel a now useless barn or granary into a tobacco shed? All these questions naturally suggest their own answer, and it is certainly difficult to see why, if change of conditions is so potent in the case of timber, orchards, or kind of crops, it should be of no effect in the case of buildings similarly affected.

It is certainly true that a case involving so complete a change of situation as regards buildings has been rarely, if ever, presented to the courts, yet we are not without authorities approaching very nearly to the case before us. Thus, in the case of *Doherty v. Allman*, 3 App. Cas. 709, before cited, a court of equity refused an injunction preventing a tenant for a long term from changing storehouses into dwelling-houses, on the ground that by change of conditions the demand for storehouses had ceased and the property had become worthless, whereas it would be productive when fitted for dwelling-houses. Again, in the case of *Sherrill v. Connor*, 107 N. C. 630, which was an action for permissive waste against a tenant in dower, who had permitted large

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barns and outbuildings upon a plantation to fall into decay, it was held that, as these buildings had been built before the Civil War to accommodate the operation of the plantation by slaves, it was not necessarily waste to tear them down, or allow them to remain unrepaired, after the war, when the conditions had completely changed by reason of the emancipation and the changed methods of use resulting therefrom; and that it became a question for the jury whether a prudent owner of the fee, if in possession, would have suffered the unsuitable barns and buildings to fall into decay, rather than incur the cost of repair. This last case is very persuasive and well reasoned, and it well states the principle which we think is equally applicable to the case before us. In the absence of any contract, express or implied, to use the property for a specified purpose, or to return it in the same condition in which it was received, a radical and permanent change of surrounding conditions, such as is presented in the case before us, must always be an important, and sometimes a controlling, consideration upon the question whether a physical change in the use or the buildings constitutes waste.

In the present case this consideration was regarded by the trial court as controlling, and we are satified that this is the right view. This case is not to be construed as justifying a tenant in making substantial changes in the leasehold property, or the buildings thereon, to suit his own whim or convenience, because, perchance, he may be able to show that the change is in some degree beneficial. Under all ordinary circumstances the landlord or reversioner, even in the absence of any contract, is entitled to receive the property at the close of the tenancy substantially in the condition in which it was when the tenant received it; but when, as here, there has occurred a complete and permanent change of surrounding conditions, which has deprived the property of its value and usefulness as previously used, the

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question whether a life tenant, not bound by contract to restore the property in the same conditition in which he received it, has been guilty of waste in making changes necessary to make the property useful, is a question of fact for the jury under proper instructions, or for the court where, as in the present case, the question is tried by the court.

*By the Court.*— Judgment affirmed.

A motion for a rehearing was denied September 26, 1899.

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## KATZER, Archbishop, etc., Respondent, vs. CITY OF MILWAUKEE and another, Appellants.

*June 7 — September 26, 1899.*

*Taxation: Exemptions: Property of religious associations: Parsonage: Land held by archbishop: Trusts and trustees: Judicial notice.*

1. Statutes exempting property from taxation are to be strictly construed, and if the meaning of such a statute is fairly ambiguous or uncertain as to a specific piece of property or owner, it is the duty of the court to resolve the doubt in favor of the taxability of the property.
2. A parsonage to be exempt from taxation under subd. 8, sec. 1038, Stats. 1898, unless rented, must be owned by the religious association, just as much as its church building or other real estate.
3. Land conveyed to an archbishop of the Roman Catholic church by a deed running to him as an individual, without official or fiduciary designation, is *prima facie* owned by him absolutely.
4. The facts that such land was purchased by the diocesan officers with funds of the diocese as a residence for the archbishop, and that it was customary in such cases to take the conveyance to the archbishop individually, and his testimony that he held the property in fee simple according to the laws of the church; that he made no claim to any individual ownership, but held it in trust for the diocese; and that he is required to devise it to his successor — are *held* insufficient to show any legally enforceable trust for a religious association.

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5. Courts will not take judicial notice of the "laws of the Roman Catholic church."
6. Although sec. 2001—10, Stats. 1898, recognizes the bishop as the only trustee of each Roman Catholic church in his diocese, sec. 2000 does not create any statutory trust in property held by him, because in the former section the latter is expressly declared to be inapplicable to said church.

APPEAL from a judgment of the circuit court for Milwaukee county: FRANK M. FISH, Judge. *Reversed.*

In 1892 the diocesan officers purchased with funds of the diocese a certain block in Milwaukee as a residence for plaintiff, who is archbishop of the diocese of Milwaukee, and took conveyance, as is customary, to the plaintiff individually. The premises are used as his residence, but also contain accommodations for his assistant officers, and various functions needing his personal presence are held there. Plaintiff testified that he held the property in fee simple according to the laws of the church; that he made no claim to any individual claim or ownership, but held it in his name for the diocese; and that he is required to devise it to his successor; also that he is chief pastor of the diocese. Taxes have been assessed on the premises in question for 1892, 1893, and 1894. Plaintiff prays adjudication that the premises are exempt and the taxes void. The circuit court so adjudged, and the defendants appeal.

For the appellants there was a brief by *Carl Runge*, city attorney, and *C. H. Hamilton*, of counsel, and oral argument by *Mr. Hamilton*. [illegible] argued, among other things, that where the legal [illegible] an individual, the fact that the property may be [illegible] church purposes does not exempt [illegible] *rel. Rorke v. Board of Assessors*, [illegible] *Little Sisters*, 29 Ohio St. 201; [illegible] *Co. Comm'rs*, 12 Minn. 395; *Peo-* [illegible] *derson*, 14 Am. & Eng. Corp. Cas.

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372. Unless the statute expressly exempts a parsonage it cannot be exempted on the theory that is a part of the property of the church. *Vail v. Beach*, 10 Kan. 214; *Ramsey Co. v. Church of Good Shepherd*, 45 Minn. 229. In order to create a legal trust there must be a *cestui que trust* capable of taking property, and, the archdiocese not being a legal person, the alleged secret trust is invalid. Tiedeman, Real Prop. § 445; Lewin, Trusts, 44; Hill, Trustees, 52. A trust is void when the beneficiary is uncertain. *Heiss v. Murphey*, 40 Wis. 276; *Ruth v. Oberbrunner*, 40 Wis. 238; *Webster v. Morris*, 66 Wis. 366; *German L. Asso. v. Scholler*, 10 Minn. 331; *Nary v. Henni*, 45 Wis. 473. Use and occupation must combine in the same association to effect exemption. *Milwaukee v. Milwaukee Co.* 95 Wis. 424; *Laurent v. Muscatine*, 59 Iowa, 406.

For the respondent there was a brief by *Wigman & Martin*, and oral argument by *P. H. Martin*. They contended, *inter alia*, that the *use* to be made of the property is the primary if not the only reason for the exemption. *Gray v. La Fayette Co.* 65 Wis. 567; *Hebrew F. S. Asso. v. New York*, 4 Hun, 446; *Trustees of P. E. Academy v. Exeter*, 58 N. H. 306, 42 Am. Rep. 589; *Gerke v. Purcell*, 25 Ohio St. 229; *Humphries v. Little Sisters*, 29 Ohio St. 207; *Laurent v. Muscatine*, 59 Iowa, 404; *Washburn College v. Shawnee Co. Comm'rs*, 8 Kan. 344; *St. Mary's College v. Crowl*, 10 Kan. 442; *Vail v. Beach*, 10 Kan. 214. The trustee of a trust resting in parol is morally bound to recognize and execute such trust. *Main v. Bosworth*, 77 Wis. 660; *Begole v. Hazzard*, 81 Wis. 274; *Karr v. Washburn*, 56 Wis. 303; *First Nat. Bank v. Bertschy*, 52 Wis. 438; *Coddell v. Blumer*, 41 Wis. 436; *Bancroft v. Curtis*, 108 Mass. 47; *Schreyer v. Scott*, 134 U. S. 405; *Randall v. Constans*, 33 Minn. 334; *Foote v. Bryant*, 47 N. Y. 544. The fact that the religious association known as the archdiocese of Milwaukee is, and ever since the purchase of the property has been, in the full, complete,

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exclusive, and unquestioned possession and enjoyment of the property, takes the case out of the operation of the statute. *Larsen v. Johnson*, 78 Wis. 300; *Cutler v. Babcock*, 81 Wis. 195; *Wall v. Minneapolis, St. P. & S. S. M. R. Co.* 86 Wis. 48; *Bartz v. Paff*, 95 Wis. 95; sec. 2305, R. S. 1878. Respondent's complaint duly verified is a sufficient recognition and declaration of the trust to satisfy the statute. *Patton v. Chamberlain*, 44 Mich. 5; *Whiting v. Gould*, 2 Wis. 552; 27 Am. & Eng. Ency. of Law, 34. The association being regularly organized, having definite territorial limits and membership and duly appointed and elected officers, and the rights of the members resting on mutual compact and assent yielded to the rites and canons of the church, as to such rights the members may sue and be sued, and courts will protect and enforce the rights and remedies of the entire membership as effectually as they do those of an individual. *Sheehy v. Blake*, 72 Wis. 411; *Fadness v. Braunborg*, 73 Wis. 257; *Mannix v. Purcell*, 46 Ohio St. 102, 15 Am. St. Rep. 562; *Brown v. Stoerkel*, 74 Mich. 269; *Lafond v. Deems*, 81 N. Y. 507; *Hyde v. Woods*, 94 U. S. 523; *Heiss v. Vosburg*, 59 Wis. 532; *Curd v. Wallace*, 7 Dana, 190, 32 Am. Dec. 85. The use of the premises as a residence for the pastor of the diocese wherein he is discharging the functions of his office is a use strictly for the purpose of the association. *Trustees of Griswold College v. State*, 46 Iowa, 275, 26 Am. Rep. 138; *Ramsey Co. v. Macalester College*, 51 Minn. 437; *State v. Ross*, 24 N. J. Law, 497.

The following opinion was filed June 22, 1899:

DODGE, J. In view of the conclusion which we have reached in this case, it is quite immaterial and unnecessary to decide whether the premises in question are in the category of "real estate necessary for the location and convenience of the buildings of a religious association," or constitute a "parsonage."

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Subd. 3, sec. 1038, Stats. 1898, whereon rests the exemption of church property from taxation, has been more than once construed by this court, and some of the uncertainties resulting from its language removed. In *Green Bay & M. C. Co. v. Outagamie Co.* 76 Wis. 591, it was held that the words "owned by any religious association, and used exclusively for the purposes of such association," which, by their immediate context, might be confined to the personal property, are not so confined in their application, but extend to the real property as well. The parsonage is exempted by the same sentence, and no reasons of construction can be urged why, if the word "owned" extends and applies to the real property, it does not also extend and apply to the parsonage. Indeed, the intention of the legislature to that effect is even stronger in the case of parsonages, for they have *ex industria* added to the exemption such parsonages as are rented, which would, of course, be wholly unnecessary if ownership were not otherwise required. This extension of the exemption to rented parsonages has also been construed in *Gray v. La Fayette Co.* 65 Wis. 567, to require that the renting shall be by the association, so that a parsonage rented by the pastor would not fall within it. It is therefore clear that the real estate necessary for the location and convenience of the buildings of such association, and embracing the same, not exceeding ten acres, and the parsonage, in order to be exempt, must be owned by and used exclusively for the purposes of such association. The extent of title required by the word "owned" has received construction but once by this court, and that in the case of *Milwaukee v. Milwaukee Co.* 95 Wis. 424, in which it was decided that lands held for park purposes under an option, upon which part of the purchase price had been paid, and to conveyance of which the city would have a right on completing payment, were not *owned* in the sense of the statute.

All of these decisions are in line with the unquestioned

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duty of courts in construing statutes exempting property from taxation. Such statutes conferring special privileges and in derogation of the sovereignty exercised over other property are to be strictly construed. If the meaning of such statute is fairly ambiguous or uncertain as to a specific piece of property or owner, it is the duty of courts to resolve the doubt in favor of the taxability of the property. It is for the legislature to grant these special privileges, and it has always been held that courts will proceed upon the assumption that whatever the legislature intends to exempt will be expressed in such clear language as to leave no doubt, and that what has been left doubtful is not intended to be exempted. *Weston v. Shawano Co.* 44 Wis. 242, 256; *West Wis. R. Co. v. Trempealeau Co.* 93 U. S. 595, 598; Cooley, Taxation, 205. Whatever our own opinion of general or specific policy may be is of no importance. The court is not vested with power to exempt from taxation, and is bound to enforce the tax laws of the state against all property and persons whom the legislature has not in unambiguous terms exempted therefrom.

The property in question is *prima facie* owned absolutely by an individual. It is conveyed by warranty deed to the plaintiff, with no intimation that such conveyance is due to his place or office, and ostensibly at least is as absolutely owned by him as the private property of any other individual. *Laurent v. Muscatine*, 59 Iowa, 404, 406. We are, however, urged to recognize the fact that, by what is called by the plaintiff and his counsel the "laws of the Roman Catholic church," he holds that property upon some trust. What that trust is is not at all defined in the evidence further than that he declares that he holds it in trust for the diocese and to devise it by will to his successor. Meanwhile, of course, in law at least, it is entirely subject to conveyance or incumbrance by him, and to his absolute control. Courts can recognize only rights which are regulated and

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established by law. The obligation of one who holds for another must rest upon and be enforceable by the law; and, however strong may be such obligations *in foro conscientiæ*, they are of no force to establish rights or ownership in any other than him who holds the legal title. That the title of the bishop of the Roman Catholic church is not a mere empty trust title, but is as absolute in law as it is in terms, has already been decided by this court, at the suit of the bishop himself, in the case of *Heiss v. Vosburg*, 59 Wis. 532, where a religious association occupying a church, title to which was in the bishop, sought to exercise acts of ownership and control contrary to his judgment. He invoked the aid of the court, and was accorded it, upon the theory, contended for by him, that his title was that of absolute owner, and that this church society was as much a trespasser as would be any stranger in interfering with his control thereof against his objection. It may well be that in the wisdom of the governing body of the Catholic church it has been deemed necessary to its policy that titles should be so held by the bishops, and full freedom is accorded them by the law to exercise their own judgment in that respect. But the privileges thereby secured of ease in transfer and absolutism of control must be accepted with such burdens as the legislature imposes upon other property so owned.

It is suggested by counsel that by reason of the recognition of the bishop by sec. 2001—10, Stats. 1898, as the only trustee of each Roman Catholic church in his diocese, sec. 2000 takes the case out of the ordinary statutes with reference to parol trusts, and creates a statutory trust for religious associations in the property held by him. His authority is *Fadness v. Braunborg*, 73 Wis. 257. Counsel overlooks, however, that in the act conferring special and peculiar privileges of organization and incorporation upon Roman Catholic churches, and in the very section recognizing the bishop as such only trustee, the Roman Catholic societies

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are expressly exempted from the effect of all the other provisions of ch. 91, Stats. 1898, inclusive of sec. 2000.

Respondent further urges that the obstacles to a parol trust are overcome by the declarations of the complaint. The only declaration of any trust therein is that plaintiff "holds the same in trust for said diocese." Waiving other considerations, this declaration fails wholly to show either a trust (*Heiss v. Murphey*, 40 Wis. 276) or a beneficiary (*Nary v. Henni*, 45 Wis. 473). We may search the evidence in vain for proof that the diocese is anything more than a geographical district, or that it designates a class of ascertained or ascertainable individuals, who, as such, might be beneficiaries, as in *Fadness v. Braunborg*, 73 Wis. 257; or that it has any purposes, charitable or otherwise, to legitimate an express trust. If such facts exist, they are not proved in this case and cannot be considered. Courts have judicial knowledge of the laws of the land, but not of the "laws of the Catholic church." *McHugh v. McCole*, 97 Wis. 166.

We are unable to find in the record of this case any facts to overcome the completeness of the legal title of the plaintiff as an individual to the property in question, or to establish ownership thereof by a religious association, and are constrained to hold that it is not exempt from taxation.

*By the Court.*—Judgment reversed, and cause remanded with directions to dismiss the complaint.

The following opinion was filed September 26, 1899:

DODGE, J. To allay the apprehensions expressed by respondent's counsel in their argument for a rehearing, it is deemed advisable to assure them that the court certainly did not decide that a church building or a parsonage, sufficiently proved to be held by the bishop upon an enforceable trust for a religious association, corporate or incorporate,

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though the conveyance to him were absolute in form, might not be exempt from taxation; for no such question was presented nor at all considered. The propositions decided were few and simple: (1) That a parsonage, to be exempt, unless rented, must be owned by the religious association, just as much as must its church building or other real estate; (2) that a deed like that in question, running to an individual without official or fiduciary designation, *prima facie* conveyed absolute title to him; and (3) that in this case no sufficient proof was made of any legally enforceable trust for a religious association,— without deciding whether such trust might be proved had the evidence offered been sufficient, or whether, if so proved, it would constitute such ownership by the society as to secure exemption from taxation. If such equitable title be provable at all, the latter question might well turn on whether, by the terms of the trust, the control over the use and title of the property was sufficiently complete to constitute practical ownership by the association, or was so restricted as to leave such practical ownership in the holder of the legal title. We are entirely satisfied of the correctness of the conclusions reached, and find no reason for reconsidering the questions decided in this case.

*By the Court.*— Motion for rehearing is denied, with $25 costs.

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PATTEN PAPER COMPANY (LIMITED) and others, Respondents, vs. GREEN BAY & MISSISSIPPI CANAL COMPANY, imp., Appellant.

*June 9 — September 26, 1899.*

APPEAL from a judgment of the superior court of Milwaukee county: R. N. AUSTIN, Judge. Motion for judgment on the mandate of the supreme court of the United States. *Motion granted.*

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The original judgment in this action was reversed on appeal, and the cause remanded to the superior court with directions to enter judgment in accordance with the opinion. 90 Wis. 370. Upon the return of the record to the trial court a judgment was entered from which a second appeal was taken, which appeal was dismissed on the ground that the judgment sought to be reviewed was a substantial compliance with the mandate on the former appeal. 93 Wis. 283. The cause was thereupon removed to the supreme court of the United States on writ of error, the judgment of the superior court being treated as in effect the judgment of this court. The judgment was reversed in that court, and the cause remanded to this court for further proceedings not inconsistent with the opinion. 172 U. S. 58. Upon the return of the cause to this court the appellant moved for judgment on the mandate of the federal court.

For the motion there were briefs by *B. J. Stevens* and *E. Mariner*, attorneys (*W. F. Vilas*, of counsel), and oral argument by *Mr. Stevens* and *Mr. Vilas*.

In opposition there was a brief by *Geo. G. Greene*, counsel for the *Patten Paper Company*, and a separate brief by *Fish, Cary, Upham & Black*, attorneys, and *John T. Fish*, of counsel, for the *Kaukauna Water Power Company*, and oral argument by *Mr. John T. Fish*, *Mr. Greene*, *Mr. D. S. Ordway*, and *Mr. Moses Hooper*.

The following judgment was filed June 22, 1899:

*By the Court.*— After hearing counsel for the respective parties, and in obedience to the mandate of the supreme court of the United States, in the above entitled action, it is determined and adjudged that the judgments heretofore entered in this court, and the judgment heretofore directed by this court to be entered by the superior court of Milwaukee county in this action, be and the same are hereby reversed and set aside, with costs to be taxed in favor of *The Green*

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*Bay & Mississippi Canal Company* in this and the trial court; and it is further adjudged that those portions of the judgment first entered in this action and brought to this court on the appeals be and the same are hereby modified so as to read as follows:

First. It is hereby considered and adjudged that the defendant *The Green Bay & Mississippi Canal Company* is the owner of, and entitled, as against all the parties to this action and their successors, heirs, and assigns, to, the water power incidentally created by said upper or government dam across the Fox river at Kaukauna, and is not obliged to permit any of the water of the river or pond to flow over the dam, but is entitled to withdraw from the pond made by said dam all of the surplus water not necessary for navigation, either through the canal or directly from the pond, and is not obliged to permit any of the water from the river or pond to flow over said dam, subject to any and all rights of the United States with reference thereto.

Second. It is further considered and adjudged that all and singular the parties to this action are hereby forever enjoined from interfering with said rights of the said *Green Bay & Mississippi Canal Company* hereby adjudged.

And as herein modified said judgment is affirmed. All costs heretofore taxed against and paid by said *Green Bay & Mississippi Canal Company* upon the judgments rendered in this court or in said superior court may be taxed as disbursements by the clerk of this court against the parties to this action to whom the same were paid. Let the record be remitted and judgment be entered by the superior court in accordance with the direction of this court.

The *Kaukauna Water Power Company* and others moved for a rehearing; and in support of the motion there was a brief by *Fish, Cary, Upham & Black.*

The motion was denied September 26, 1899.

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## KURTZ, Respondent, vs. JELLEFF, Appellant.

*September 5 — September 26, 1899.*

*New trial: Newly discovered evidence.*

**A motion for a new trial on the ground of newly discovered evidence is properly denied where such evidence consists largely in admissions of the plaintiff and there is no substantial excuse stated for not having the witnesses or their testimony present upon the trial. A mere general assertion of "due diligence" or want of negligence is not enough.**

APPEAL from a judgment of the municipal court of the city and town of Ripon: J. W. HALL, Judge. *Affirmed.*

For the appellant there was a brief by *R. L. Morse*, attorney, and *J. Dobbs*, counsel, and oral argument by *J. H. McCrory.*

*J. J. Foote*, for the respondent.

CASSODAY, C. J. This is an action to recover $131.24, money had and received. The answer interposes two counterclaims, one for $25 for services rendered, and the other for $75, the alleged agreed price for procuring a purchaser for certain real estate. The plaintiff replied, putting in issue both counterclaims. A jury having been waived and trial had, the court found that the defendant was entitled to the $25 alleged in the first counterclaim, but that the second counterclaim, for $75, had not been proved, and that the plaintiff was entitled to recover the $131.24, less the $25; that is to say, $106.24. From the judgment entered thereon accordingly the defendant appeals.

Upon the trial the defendant gave evidence tending to prove that the plaintiff agreed to pay the defendant all he received on the sale of nine acres outside of the village and a house and three or four lots inside of the village, over and above $650, and that he sold the same and received therefor

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$725, leaving a balance of $75. The defendant contends that the finding of the court on this question is not sustained by the evidence, but omits to print a considerable portion of the evidence bearing upon the question. After careful consideration, we are constrained to hold that the finding is supported by the preponderance of the evidence, and that the defendant did not sell, nor find a purchaser for, such lands; certainly not for all of them.

The motion for a new trial on the ground of newly discovered evidence was properly denied. Such newly discovered evidence consists largely in admissions of the plaintiff, and there is no substantial excuse stated for not having such witnesses or their testimony present upon the trial. A mere general assertion of "due diligence" or want of negligence was not enough.

*By the Court.*—The judgment of the municipal court of Ripon is affirmed.

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## In re Goking's Will.

*September 5 — September 26, 1899.*

*Wills: Undue influence.*

A finding of the trial court that an alleged will was not procured by undue influence on the part of the testator's widow is *held* to be sustained by the evidence.

Appeal from a judgment of the circuit court for Sheboygan county: N. S. Gilson, Circuit Judge. *Affirmed.*

This is a will contest. William Goking, the testator, was born in Germany in 1822, and was married to *Louisa Goking*, his widow and the proponent of the will, in 1851. He came to this country in 1852, and lived until his death, March 12, 1897, most of the time in Sheboygan county, in this state. He had accumulated about $30,000 worth of prop-

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erty, and left surviving him his widow, the proponent, and five adult children. He executed the will in question July 17, 1878, leaving everything to his widow. The will was offered for probate, and due execution thereof was proven; but four of the children contested the will on the ground of undue influence on the part of the widow. The will was admitted to probate in the county court of Sheboygan county, and upon appeal to the circuit court the same judgment was rendered, and from that judgment the contestants prosecute this appeal.

The cause was submitted for the appellants on the brief of *Martin Hughes* and *A. C. Prescott*, and for the respondent on that of *Francis Williams*.

WINSLOW, J. The sole question in this case was one of fact, namely, as to whether the alleged will was procured by undue influence on the part of the testator's widow. Upon this question there was testimony upon both sides. The circuit court found the issue in favor of the proponent of the will, and we cannot say that such finding is not justified by the evidence. A review of the evidence would be profitless.

*By the Court.*— Judgment affirmed.

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DUECKER and another, Respondents, vs. GOERES and others, imp., Appellants.

104 29
113 *845

*September 5 — September 26, 1899.*

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(1) *Equity: Reformation of written instrument.* (2–5) *Transcript of justice's judgment: Failure to show date of rendition: Extinguishment of judgment by limitation: Guaranty: Measure of damages: Foreclosure of mortgages: Personal liability for deficiency: Limitations: Form of judgment.*

1. To warrant a court of equity in reforming a written instrument, the facts calling for it must be established by clear and satisfactory evidence and beyond all reasonable controversy.

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2. The transcript of a justice's judgment filed in the office of the clerk of the circuit court of the county where it was rendered, pursuant to sec. 2900, Stats. 1898, for the purpose of giving such judgment the status of a circuit court judgment till ten years from the date of its rendition, pursuant to sec. 2902, is a nullity unless the statutes in relation to such transcript and the filing thereof are followed in every material particular.

3. The provisions of sec. 3669, Stats. 1898, relating to the form of transcripts of justice's judgments, and sec. 2902, limiting the life of a transcripted judgment, make the date of the rendition of the judgment in justice's court a material part of such transcript.

4. A transcript of a judgment which did not show the date of its rendition was filed in the office of the clerk of the circuit court of the proper county, and more than six years after such rendition the owner assigned such judgment to another, guaranteeing that it was a legal judgment, and secured such guaranty by a mortgage on real estate. *Held:*

(1) The filing of the transcript was a nullity.

(2) The judgment was extinguished by the six-year limitation upon the enforcement of a justice's court judgment.

(3) The condition of the mortgage was breached when made, rendering the mortgagor liable for such damages as must reasonably have been in the contemplation of the parties at the time of the making of the guaranty as the probable result of such a breach.

(4) The proper measure of damages in the circumstances stated is the full consideration paid for the judgment, with interest.

5. The mortgage executed under the circumstances stated in the foregoing was foreclosed more than six years after the cause of action for the breach of guaranty accrued. Judgment was rendered in form for a personal recovery, and it also provided for a deficiency judgment. The mortgage was also erroneously reformed, though the amount of the liability secured was not thereby changed. *Held:*

(1) The judgment, being right on the evidence, except as to the provisions for a personal recovery, must be affirmed except as to such provisions, though rendered on an erroneous theory as to the character of the mortgage.

(2) The statute of limitations upon the personal liability having extinguished it, the provisions in the judgment for a personal recovery, whether by the judgment as originally rendered or a deficiency judgment to be thereafter rendered, were erroneous.

(3) Sec. 3162, Stats. 1898, prescribing the form of a foreclosure judgment, is mandatory, and provides for a personal recovery only by means of a deficiency judgment, and in that case only against

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the person personally liable. The rendition of a judgment otherwise is erroneous, though where such judgment is in the form of a personal recovery and also authorizes a judgment for a deficiency, where such judgment is proper, the two will be so construed as to give the provision for a personal recovery without a deficiency judgment the effect, only, of a determination of the amount secured by the mortgage.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Manitowoc county: N. S. GILSON, Circuit Judge. *Modified and affirmed.*

Action to reform a mortgage and foreclose it as reformed. The issues made by the pleadings are covered by the findings of fact, which are substantially as follows:

May 31, 1880, defendant *Henry Goeres*, being then the owner of a judgment rendered in justice's court against one Christman for $142.24 and costs, filed a transcript thereof, not stating the date of the judgment, in the office of the clerk of the circuit court where some lands owned by the judgment debtor lay, and thereafter, about February 10, 1888, being indebted to plaintiffs in the sum of $103, traded such judgment to them for a discharge of his said indebtedness and $73.12, which aggregated more than the amount due on the judgment, $75 having been paid thereon not earlier than August 4, 1885, or later than June 8, 1887, *Goeres* agreeing as part of the transaction to guarantee that the judgment was good and collectible and to secure such guaranty by a mortgage on some lands owned by him. There was a further agreement that *Goeres* should attend to the collection of the judgment without cost to the plaintiffs. Intending to carry out the agreement stated, *Goeres* assigned the judgment to plaintiffs in writing and made and delivered to plaintiffs the mortgage in suit, in which it was specified that its purpose was to secure "the legality of the judgment" and that it was to be null and void "if such

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judgment is legal and correct." Further, contrary to the facts, the mortgage contained the usual provisions applicable to a mortgage to secure an indebtedness on a promissory note of $200. The parties to the transaction did not comprehend the meaning of the words "legality" and "legal and correct," and on that ground, and through forgetfulness on the part of *Goeres* respecting the precise verbal agreement as to guaranteeing the judgment to be good and collectible and that he would attend to its collection, the guaranty was not clearly expressed in the mortgage, the parties relying on the words "legality" and "legal and correct" to express the idea of *good and collectible.* After the transaction was consummated *Goeres* made endeavors from time to time to collect the judgment in accordance with his verbal agreement to do so, but failed to collect any part of it. The judgment was in fact valueless because of prior liens on the realty of the judgment debtor. Defendant *Balz*, with knowledge of plaintiffs' rights, became the owner of the mortgaged premises before the commencement of this action.

There were other findings appropriate to a foreclosure judgment, and conclusions of law that plaintiffs were entitled to a reformation of the mortgage in accordance with the facts, and to a judgment of foreclosure as prayed for. There was evidence all one way that in order to induce plaintiffs to take the judgment, *Goeres* represented that it was a lien on real estate of the judgment debtor prior to that of an outstanding mortgage, and that the mortgagee would pay the judgment to save his claim. The finding was to the effect that the judgment, if valid, would have been subject to the mortgage instead of the mortgage subject to the judgment. The answer contained a plea of the statute of limitations as to any claim of personal liability against *Goeres.* Judgment was rendered, following the findings, for a recovery from *Goeres* of the amount of the liabil-

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ity secured by the mortgage as determined by the judgment, and costs; and it also contained the usual provisions of a foreclosure judgment and for a judgment for deficiency.

For the appellants there was a brief by *G. G. & C. H. Sedgwick*, and oral argument by *G. G. Sedgwick*.

For the respondents there was a brief by *Nash & Nash*, and oral argument by *L. J. Nash*.

MARSHALL, J. The first assignment of error which needs consideration goes to the question of whether the findings of fact, as to *Goeres* having guaranteed the judgment to be good and collectible, agreed to give a mortgage to secure such guaranty, given the mortgage in suit in fulfillment of such agreement, and used the words therein "legal and correct" as the equivalent of the words "good and collectible" by mutual mistake of himself and plaintiffs, are supported by the evidence. The conclusion to which we have arrived on the whole case renders that assignment of error of little importance, but it is deemed best to discuss and decide the question involved.

The parties to the transaction which resulted in the giving of the mortgage all testified on the trial, and on their evidence the reformation was decreed. Plaintiffs testified, in substance, that *Goeres* agreed to give the mortgage to secure the payment of the judgment assigned; that *Goeres* drew the mortgage and before its delivery read it to them, while one of them looked over to be certain it was read right; that one of them also read the mortgage; that they knew what was in it, but did not fully understand the words used, though they made no mention of that fact or complaint that the instrument was not according to the agreement till about the time of the commencement of this action, some nine years after the transaction. *Goeres* testified that during the negotiations leading up to the assignment of the judgment to plaintiffs one of them remarked that they did not



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know whether the judgment was legal, whereupon he agreed to secure them as to that by a real-estate mortgage; that he drew, executed, and delivered the mortgage in suit for the purpose of fulfilling such agreement; that the words "legal and correct" were used understandingly and in accordance with the agreement; that he read the mortgage to plaintiffs at the time it was presented to them, and that they did not then, nor thereafter, till about the commencement of this action, complain that it did not express the understanding of the parties. The evidence is all one way as to plaintiffs having knowledge of the contents of the mortgage when it was delivered to and accepted by them. True, they testified that they acted through mistake as to the meaning of the words "legal and correct," but *Goeres* testified that he acted in the belief that the words used would bind him for the validity of the judgment according to the agreement. There are many circumstances bearing on the credibility of the evidence referred to, but rather more that corroborates the testimony of *Goeres* than that of plaintiffs. They were business men and leading citizens of the town in which they resided. They kept their books and did their business, using the English language, so it is not easy to understand how they could have misunderstood words of agreement to be responsible for the legality of the judgment for words guaranteeing the payment of it. It is significant that the guaranty was for the payment of the judgment, according to the testimony of plaintiffs. The idea that the agreement was that *Goeres* should guarantee the collectibility of the judgment, which found a place in the findings of the court, does not appear to be sustained by any evidence, and on the question of mutual mistake the evidence is at least evenly balanced, if it does not preponderate against the findings complained of.

Testing the findings under consideration by the familiar rule that to warrant the reformation of a written instru-

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ment because of fraud upon the one side and mistake upon the other, or of mutual mistake, the facts in that regard must be made to appear by the most clear and satisfactory evidence so as to leave no room for reasonable controversy on the subject, they cannot be sustained; indeed, they hardly bear the test applicable to findings of fact in ordinary civil actions.

But it is said by respondents that, conceding that the reformation of the mortgage should not have been decreed, the judgment appealed from is right because the assigned judgment was not legal and correct; that the transcript filed did not show when the judgment was rendered in justice's court and was therefore a nullity; hence that the judgment was extinguished by the running of the statute of limitations before the assignment, it being then more than six years old. Because of the age of the judgment when assigned, obviously whether it was then an enforceable liability depends upon whether a proper transcript of it was filed in the office of the clerk of the circuit court of the county where it was rendered, before it was barred by the statute as a justice's court judgment.

Sec. 3669, Stats. 1898, requires the form of such a transcript to exhibit the date of the rendition of the judgment. That is material, as only existing judgments can be transcripted to the circuit court, and their life there is limited, not to a period commencing with the filing of the transcript in the circuit court, but with the date of the rendition of the judgment in the court below. Sec. 2900 provides that upon the filing in the office of the clerk of the circuit court of the duly certified transcript of a judgment for more than $10 rendered by a justice of the peace for his county, it shall be docketed in, and thereafter be deemed the judgment of, said circuit court, except that no execution shall be issued or action brought thereon after it ceases to be a lien on real estate under sec. 2902, which limits such lien to ten years

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from the rendition of the judgment. It is clear that those parts of a transcript of a justice's judgment necessary to show that it is an enforceable liability at the time the transcript is filed in the circuit court, and to show when that liability will cease notwithstanding the filing of the transcript, are material and must be complied with in order to give it the effect mentioned in sec. 2900. It is elementary that statutes of the kind under consideration must be strictly complied with in every material particular, or the attempt to obtain the benefits of them will fail. Freeman, Judgments, § 396.

The foregoing leads to the conclusion that the filing of the transcript was a nullity, and because the judgment was more than six years old when assigned, and had not been seasonably transcripted to the circuit court in order to give it the status of a judgment of said court, it was barred by the statute of limitations, and not "legal and correct" within the meaning of those words as used in the mortgage. So the result is that, notwithstanding the conclusion here is against the respondents as to the determination of the court reforming the mortgage, it must be upheld as enforceable for the damages sustained by the plaintiffs because of the invalidity of the judgment.

The loss being entire, the measure of damages in case of a failure of title to personal property applies to the facts of this case. The proper rule, by the great weight of authority, is the consideration paid, with interest from the time of such payment. Suth. Dam. (2d ed.), § 669; *Noel v. Wheatly*, 30 Miss. 181; *Eaton v. Mellus*, 7 Gray, 566. The amount of the mortgage claim as found by the trial court is the same as the amount of plaintiffs' damages, by the rule above stated. Therefore appellants are not prejudiced by the judgment appealed from so far as it merely enforces the mortgage against the property therein described, notwithstanding the erroneous decree of the court reforming

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it so as to make it a security for the collectibility of the assigned judgment instead of its validity.

What has been said renders the mortgage as binding on *Balz* as on *Goeres*. The transcript of the judgment, by the terms of the mortgage, was brought home to *Balz*. He took title with constructive knowledge of the fact that such judgment was invalid. Moreover we see no reason on the evidence for disturbing the finding of the trial court that *Balz* purchased with actual knowledge of the plaintiffs' claim as to the liability of his vendor under the mortgage.

The further point is urged by appellants that the personal judgment for the deficiency was error. The obligation which the mortgage secured was on a verbal contract of guaranty. Such contract was breached as soon as made, and the cause of action upon it was then complete. Therefore the six-year statute of limitations commenced then to run against such liability, and such statute operated to extinguish it as a personal claim in six years after it accrued. That left no foundation for an action at law on the contract or for a personal judgment, though it did not prevent the foreclosure of the mortgage, for the twenty-year statute governs as to that. *Wiswell v. Baxter*, 20 Wis. 680; *Whipple v. Barnes*, 21 Wis. 327; *Knox v. Galligan*, 21 Wis. 470; *Slingerland v. Sherer*, 46 Minn. 422; Jones, Mortgages, § 1204. There is some conflict in the authorities on this question, but the better reasoning and the great weight of authority is in accord with the doctrine stated, which early became a part of the law of this state as indicated in the cases cited. Under the old practice there were two remedies for the collection of a debt secured by a mortgage: One at law upon the contract, and the other in chancery to foreclose the mortgage. The former was to enforce the personal liability, and the other to realize upon the security. Personal judgments were not rendered in chancery. The remedy there was confined to obtaining the

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benefit of the mortgaged property. The remedy by personal action and that by foreclosure still exist and may now be pursued separately, or the former remedy may be administered in the foreclosure action because the statutes so provide; but there are still the two distinct kinds of relief, and the right to one may be barred without affecting the right to the other. If a person desires to enforce his rights at law, to enforce the purely personal liability he must bring his action within the period limited for that purpose, otherwise he will be limited to the right to enforce the mortgage as if it were not given to secure any personal liability. By the wording of the statute the judgment for deficiency goes only against the person personally liable. Obviously, looking at that alone, when the personal liability no longer exists the power to render a personal judgment in the foreclosure action cannot be exercised, because there is no longer any one personally liable to satisfy the conditions of the statute.

The judgment is also erroneous because, instead of merely fixing the amount of the mortgage claim as required by statute (sec. 3162, Stats. 1898), it is in the form of a personal judgment. The statute is mandatory by its terms and by sec. 3154. It has been held that where the judgment is personal in form and is followed by an order for a deficiency judgment, the two parts should be construed together so as to give the first part the effect of a strict compliance with sec. 3162, and render the error harmless. *Welp v. Gunther*, 48 Wis. 543; *Boynton v. Sisson*, 56 Wis. 401; *Crocker v. Currier*, 65 Wis. 662; *Laycock v. Parker*, 103 Wis. 161. But that rule cannot apply where the order for the deficiency judgment must be stricken out because there was no one personally liable or for any other cause rendering a personal judgment improper.

*By the Court.*— The judgment appealed from is modified by striking out the order authorizing a judgment for de-

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ficiency, and so it will fix the amount due on the mortgage claim without any provision for its personal recovery, and as modified it is affirmed. The costs against respondents in this court are limited to attorney's fees, clerk's fees, and $25 for printing.

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SCHAEFER, Respondent, vs. CITY OF FOND DU LAC, imp., Appellant.

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L118 1 70

*September 5 — September 26, 1899.*

(1, 2) *Municipal corporations: Injuries from defective streets: Action against person primarily liable: Limitations: Laches.* (3) *Appeal: Record.*

1. The charter of the city of Fond du Lac provided (sec. 4, subch. 18, ch. 152, Laws of 1883) that the city should not be liable for injuries resulting from defects in the streets caused by the neglect of any person or corporation until all legal remedies should be exhausted against the party primarily liable; also (sec. 4, ch. 435, Laws of 1889) that no action for such injuries should lie against the city unless commenced within one year after the injury. Ch. 471, Laws of 1889 (sec. 1340*a*, Stats. 1898), provided that in such cases the city and party primarily liable might be sued in the same action, and that in an action against one the other might be made a party by amendment of the complaint. *Held*, that it was not essential to a liability of the city that the action against the person primarily liable should be commenced within one year.
2. Plaintiff in such a case proceeded with diligence against the party supposed to be primarily liable and obtained judgment. Afterwards, within one year after the injury, he sued the city, which alleged that another person was primarily liable; and on appeal from a judgment against the city it was so decided. Thereupon, it being then about three years after the injury, the plaintiff made such person a party. *Held*, that he was not guilty of such laches in proceeding against the party primarily liable as would defeat a recovery against the city. *McFarlane v. Milwaukee*, 51 Wis. 691, distinguished and its applicability, since the enactment of ch. 471, Laws of 1889, doubted.
3. Counsel have no right on appeal to found any argument upon, or bring into the case, a fact not disclosed by the record.

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Schaefer vs. City of Fond du Lac.

APPEAL from an order of the circuit court for Fond du Lac county: N. S. GILSON, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *O. H. Ecke*, city attorney, and *Maurice McKenna* and *Edward W. Phelps*, of counsel, and oral argument by *Mr. Ecke* and *Mr. Phelps.*

*Edward S. Bragg*, of counsel, for the respondent.

BARDEEN, J. On June 25, 1895, the plaintiff met with an accident while traveling on one of the streets of the defendant city, alleged to have been caused by the want of repairs therein. Due notice thereof was given the city on July 9, 1895. Thereafter, on July 19th of the same year, the plaintiff commenced an action against the Fond du Lac Light, Power & Railway Company, in which it was claimed that the company was primarily liable for the defect in the street. In November following, the plaintiff secured a judgment against the company for $2,063.21 damages and costs. An execution was issued, and returned wholly unsatisfied. On January 20, 1896, and within one year from the happening of the accident, the plaintiff commenced this action against the city, setting up the recovery against the company, and claiming the right to recover the amount thereof against the city. The city answered that one Elihu Colman, and not the company, was primarily liable for the defect in the street, and denying any liability therefor. The case came to trial, and resulted in a judgment for plaintiff. An appeal was taken to this court, and upon due consideration it was determined that the evidence showed that Colman, as well as the company, was primarily liable to plaintiff, and that under the city charter the exhaustion of all legal remedies against both was a condition precedent to the right of plaintiff to maintain this action. 99 Wis. 333.

Upon remission to the court below the plaintiff applied for and secured leave to make Colman a party defendant. The plaintiff made and served an amended complaint setting

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up the facts substantially as herein stated, and alleging Colman's liability for the injuries sustained. To this complaint the city interposed a demurrer that the action was not commenced within the time limited by the charter, and that the complaint did not state facts sufficient to constitute a cause of action. The circuit court overruled the demurrer, and the city appeals.

The points made by the counsel for the city against the order of the court below are based upon certain charter provisions which it is claimed preclude a recovery in this action. Sec. 4, subch. 18, ch. 152, Laws of 1883, provides, in substance, that in case of injury or damage by reason of the insufficient or defective condition of the streets, produced or caused by the wrong, neglect of duty, or default of any person or corporation, such person or corporation shall be primarily liable for all damages for such injury, "and the city shall not be liable therefor until all legal remedies shall have been exhausted to collect such damages from such person or corporation." Sec. 4, ch. 435, Laws of 1889, being an amendment to the charter, contains a clause to the effect that no action shall lie against the city on account of injuries occurring by reason of the insufficiency or want of repair of any street, "unless such action shall be commenced within one year from the happening of such injury," nor unless notice should be given to certain officials, named, within thirty days. Relying upon these provisions, it is argued that the action should not only be commenced against the city within the year, but also against the person primarily liable.

This contention ignores the force and legal effect of ch. 471, Laws of 1889, now sec. 1340*a*, Stats. 1898, which provides that the city and party primarily liable may be sued in the same action, and that in any such action brought against any town, city, village, or county in which it shall be alleged in the answer that the defendant is not primarily liable, and that some person or private corporation is so lia-

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ble, the plaintiff may amend his complaint, as provided in sec. 2834, and bring in such party, and, if brought against any person or private corporation, the plaintiff may amend by making the proper corporation a party defendant. This law was in force at the time of the injury complained of and at the commencement of this action. The action was commenced within one year from the date of the happening of the accident. The year of limitation mentioned in the charter does not apply to the party primarily liable. The plaintiff may pursue the latter to judgment any time within the period of general limitation in regard to such causes of action. The only conditions imposed by the charter are that the action must be commenced against the city within one year, and that all legal remedies shall be exhausted against the party primarily liable before the city shall be required to pay. These conditions are not inconsistent with the general law referred to, especially as ch. 471 provides that any judgment against the city shall not be enforced until execution shall have been issued against the parties primarily liable and returned unsatisfied in whole or in part. The provisions of this section, having relation only to the remedy, and not contravening any provision of the charter, must be held applicable to the case in hand.

Omitting the allegations of the complaint regarding the railway company, we find there is sufficient allegation of injury, notice to the city, answer of the city setting up Colman's liability, leave to amend complaint, and proper allegations of Colman's negligence. We are satisfied that the conditions of the charter and general law have been met, and the objection to the complaint on the grounds stated cannot prevail.

It is further argued that the plaintiff has lost his right to prosecute this action as it now stands because of laches in making Colman a party defendant, under *McFarlane v. Milwaukee*, 51 Wis. 691. Upon the facts stated, we should hesi-

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tate to say that plaintiff had been guilty of such laches as to preclude a recovery in this action. He proceeded with diligence against the party supposed to be primarily liable, and obtained judgment. The fact that such litigation resulted in a judgment would lead the ordinary man to suppose that he had reached the right party. It would also be a sufficient ground for his insisting upon his position notwithstanding the answer of the city setting up Colman's liability. There is no parallel between this and the *McFarlane Case* in this respect. There the delay was five years and six months. In *Raymond v. Sheboygan*, 76 Wis. 335, this court said: "Ch. 471, Laws of 1889, has changed the remedy so that in proceeding against the city it can no longer be regarded as a mere guarantor of the collectibility of any damages that may be recovered against the principal wrong-doer." The basis of the *McFarlane Case* is that the city was in the position of guarantor, and that from the long delay in bringing suit against the party primarily liable without explanation injury would be presumed. If, as held in the *Raymond Case*, the city is no longer a guarantor, then the reasoning of the *McFarlane Case* has no application, and cannot be said to be controlling in cases of this kind.

Another branch of appellant's argument is based upon the assumption or suggestion that Colman is dead. No mention of that fact is made in the pleadings, and counsel had no right to found any argument upon, or bring into the case, a fact not disclosed by the record.

*By the Court.*— The order of the circuit court is affirmed.

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HARRIS, Respondent, vs. CITY OF FOND DU LAC, Appellant.

*September 5 — September 26, 1899.*

*Municipal corporations: Injuries from defective streets: Notice: Service: Special charter provisions.*

1. The provision of sec. 1339, R. S. 1878, requiring, as a condition precedent to an action, that notice of injuries from a defective highway be given within ninety days was not (under sec. 4986) applicable to cities having special and inconsistent charter provisions. By ch. 236, Laws of 1897, said sec. 1339 was amended so as to limit to fifteen days the time for giving notice in case of a city. *Held*, that the amendment did not extend the application of the section, and that special and inconsistent charter provisions would still prevail.
2. A provision in a city charter requiring notice of an injury from a defective street to be served upon the street commissioner or sidewalk superintendent of the city or an alderman of the ward in which the injury occurred is not complied with by service on the mayor and city clerk.

APPEAL from an order of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

The appeal is from an order overruling defendant's demurrer. The complaint set forth that on August 23, 1897, plaintiff was injured by reason of a defective street in said city; that, by reason of such injuries, he was rendered insensible for a long time, and during the resulting illness suffered such severe pains as to render him physically and mentally unable to attend to business or to correspond with his attorney; that, as soon as he was able, and on the 16th of September, 1897, he caused written notice to be given said city, by serving the same upon B., city clerk of said city, and upon E., mayor of said city, personally. The demurrer was upon the ground that the complaint stated no cause of action, for that it showed no service of notice upon the city within the time required by law.

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For the appellant there was a brief by *O. H. Ecke*, city attorney, and *Maurice McKenna* and *Edward W. Phelps*, of counsel, and oral argument by *Mr. Phelps* and *Mr. Ecke*.

For the respondent there was a brief by *Cooper, Simmons & Nelson*, and oral argument by *Peter B. Nelson*.

DODGE, J. The charter of *Fond du Lac*, as amended (sec. 4, ch. 435, Laws of 1889), declared that no suit should be maintained unless a notice was served within thirty days after the injury, upon the street commissioner or sidewalk superintendent of the city, or an alderman of the ward where the injury occurred, and provided: "But when the person so injured shall in consequence thereof be bereft of reason, the notice shall not be required until thirty days after he has been fully restored to consciousness." By ch. 236, Laws of 1897, sec. 1339, R. S. 1878, is amended so as to provide that no action for injuries from defective highways shall be maintained unless notice is given within thirty days in case of any county or town, and fifteen days in case of any city or village, to the county clerk of the county, supervisor of the town, one of the trustees of the village, or the mayor or city clerk of the city.

The question debated by counsel, and which we therefore take up for consideration, was whether the amendment of sec. 1339, made in 1897, applied to and controlled in the city of *Fond du Lac*, or whether the charter of that city was still in force upon the subject of notice. The somewhat extended argument of counsel for respondent, that the notice clause, especially that in case of one bereft of reason, in the city charter, should not be repealed by implication unless the general act is clearly repugnant, needs but little consideration. Repugnancy is too plain for discussion between a provision that a notice must be given in all cases within fifteen days, and one declaring that in some cases it need not be given until thirty. The question is at once broader and

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more simple. Was it intended by the legislature, in the enactment of ch. 236, Laws of 1897, to thereby extend the provisions of sec. 1339 over all cities, or to except therefrom cities having special charter provisions on the general subject covered by it and inconsistent with it? Sec. 4986, R. S. 1878, provided that the laws contained in the Revised Statutes shall apply to, and be in force in, every city and village, so far as the same are not inconsistent with the charter of any such city or village. When the provisions of any such charter are at variance with the provisions of the Revised Statutes, the provisions of such charter shall prevail, unless a different intention be plainly manifested.

It is thus apparent that sec. 1339, as it existed before the amendment in 1897, was not applicable, at least upon the subject of notice, to the city of *Fond du Lac;* and its amendment, by changing the time limit for notice, can no more be obnoxious to constitutional objection, by reason of the constitutional amendment of 1892, than could the legislation considered in *State ex rel. Farrell v. Howe*, 95 Wis. 530, because limited to the same class of cities as the original section.

This act was by its express terms an amendment of sec. 1339, substituting fifteen for the ninety days originally therein limited. That section, by virtue of sec. 4986, was confined to certain cities, viz., those not having special and inconsistent charter provisions, and did not apply to *Fond du Lac. Walworth Co. v. Whitewater*, 17 Wis. 193. It is hardly conceivable that the legislature, by amending such section in a single detail, intended to legislate with reference to a city not affected thereby. We think it obvious that the legislative purpose went no further than amendment, and that sec. 1339 applied to no other cities afterward than before. As a result, the giving of notice at the time of the injury complained of was regulated by the charter, and not by the Revised Statutes. *Thompson v. Milwaukee*, 69 Wis. 492; *Baines v. Janesville*, 100 Wis. 369.

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The statement in *Daniels v. Racine*, 98 Wis. 649, to the effect that the amendment to the statute in question applied to all cities and villages, was, of course, made with reference to the case there presented,— that of a city having no special charter provision on the subject of notice, and therefore within the class regulated by the section amended. So understood, it in no wise conflicts with the construction now adopted.

Although, as a result of the conclusion reached above, the attempted service was within the time limited by law, the complaint fails to allege service in the manner provided. The charter requires service upon the street commissioner or sidewalk superintendent of the city or an alderman of the ward where the injury occurred. The complaint alleges no service on either of these officers, but, instead, upon the mayor and city clerk. This is necessarily fatal. Notice as required by the statute applicable is a condition precedent to suit, and an essential allegation of the complaint.

*By the Court.*— Order appealed from is reversed, and cause remanded with directions to sustain the demurrer.

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STOLZE and wife, Respondents, vs. THE MILWAUKEE & LAKE WINNEBAGO RAILROAD COMPANY and others, Appellants.

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*September 5 — September 26, 1899.*

*Railroads: Condemnation of land: Failure to pay damages: Injunction against operation of road: Receivers: Leave of court to bring action.*

1. Under our statutes no permanent right is acquired in land condemned for a railroad until the damages as finally determined have been paid or their payment provided for as prescribed by law.
2. After the commissioners of appraisal had filed their award in condemnation proceedings, the railroad company deposited the amount thereof with the clerk of the court, and thereupon entered upon

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the lands condemned, made excavations for its roadway, and constructed its track. This was done without the consent of the owners, who never voluntarily relinquished the possession of the land. Upon an appeal from the award the owners obtained judgment for a much larger sum, but this was never paid, tendered, or deposited, and an execution on the judgment was returned unsatisfied, the company being insolvent. *Held*, that the owners, having no adequate remedy at law by action in ejectment, were entitled to an injunction against said company and others claiming under it, restraining the operation of the road until payment should be made.

3. Although, in such case, the road was in the possession of receivers, appointed by a federal court, of the property of a company to which the road had been leased, it was not necessary to obtain leave from that court before maintaining the action for an injunction in a state court.

APPEAL from an order of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

For the appellants the cause was submitted on the brief of *Thos. H. Gill*, attorney for the *Milwaukee & Lake Winnebago R. Co.*, and *Howard Morris* and *Thos. H. Gill*, attorneys for *Whitcomb* and *Morris*.

For the respondents there was a brief by *Timlin, Glicksman & Conway*, and oral argument by *W. H. Timlin*. They argued, among other things, that where condemnation proceedings have been resorted to and the legal remedies thereon exhausted, the landowner may have a remedy by injunction to prevent the use of his land without compensation, or, in other words, to secure him in his constitutional rights, ordinary legal remedies having proven unavailing. *Gilman v. S. & F. du L. R. Co.* 40 Wis. 653; *Cherokee Nation v. S. K. R. Co.* 135 U. S. 641; *Irish v. B. & S. W. R. Co.* 44 Iowa, 380; *Richards v. D. M. V. R. Co.* 18 Iowa, 259; *Holbert v. St. L., K. C. & N. R. Co.* 45 Iowa, 23; Lewis, Em. Dom. § 618, and cases in note; 6 Am. & Eng. Ency. of Law (1st ed.), 592, notes 3, 4; *Omaha & N. W. R. Co. v. Menk*, 4 Neb. 21; *Ray v. A. & N. R. Co.* 4 Neb. 439; *Western Md. R. Co.*

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*v. Owings*, 15 Md. 199; *Kendall v. M. & C. R. R. Co.* 55 Vt. 438; *Provolt v. C., R. I. & P. R. Co.* 69 Mo. 633; sec. 13, art. I, Const. Wis.; *Sherman v. M., L. S. & W. R. Co.* 40 Wis. 645; *Thien v. Voegtlander*, 3 Wis. 461; *Shepardson v. M. & B. R. Co.* 6 Wis. 605; *Loop v. Chamberlain*, 20 Wis. 135; *Newell v. Smith*, 15 Wis. 101; *Birmingham T. Co. v. Birmingham R. & E. Co.* 119 Ala. 129; *Gammage v. G. S. R. Co.* 65 Ga. 614; *White v. N. & N. W. R. Co.* 7 Heisk. 518; *Chattanooga, R. & C. R. Co. v. Jones*, 80 Ga. 264; *Cooper v. Anniston & A. R. Co.* 85 Ala. 106; *Woodworth v. Brooklyn E. R. Co.* 29 App. Div. 1; *Ft. Worth & R. G. R. Co. v. Jennings*, 76 Tex. 373; *Rio Grande & E. P. R. Co. v. Ortiz*, 75 Tex. 607; *Thornton v. S. & B. R. Co.* 84 Ala. 109.

CASSODAY, C. J. This is an appeal from an order overruling a demurrer interposed by the defendants the *Milwaukee & Lake Winnebago Railroad Company*, and *Henry F. Whitcomb* and *Howard Morris*, as receivers of the Wisconsin Central Railroad Company and the Wisconsin Central Company, to a complaint alleging, in effect, that prior to July 13, 1895, the plaintiffs were, and ever since have been, the owners of the lands described, together with all the houses, buildings, and improvements thereon; that the same constituted their homestead; that August 6, 1895, the defendant the Manitowoc Terminal Company instituted proceedings in the circuit court for the condemnation of the right of way, depot grounds, and terminals for that company; that such proceedings were had therein that commissioners were duly appointed in such condemnation proceedings at the instance of that company, and that they made and filed their award in writing, wherein and whereby they fixed the amount of compensation to be made to the plaintiffs, and to the defendant Adolph Piening and the city of Manitowoc for the taking of the premises described for the purposes of such railway at $1,766; that such award of the



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commissioners was grossly inadequate; that within thirty days from the filing of the same the plaintiffs therein and the Manitowoc Terminal Company each appealed from such award to the circuit court of Manitowoc county; that Adolph Piening never had any interest in such tract of land or in the award, and that the city had no interest in the award and on May 15, 1896, executed and delivered to the plaintiff *Henry Stolze* a transfer and conveyance of all its right, title, and claim of any damage or claim for damage against the Manitowoc Terminal Company, or its successors or assigns, on account of the construction to be made, and in and to the lands described; that immediately after the filing of the award that company paid the amount of such award — that is to say, $1,766 — to the clerk of the circuit court, and without the consent of the plaintiffs, or either of them, entered upon the land so condemned, and excavated the right of way to a depth of about thirty feet at the deepest place, and laid a railroad track thereon, and greatly damaged the adjacent lands of the plaintiffs not actually taken, and rendered worthless the lands for gardening purposes, and the improvements thereupon adapted for such purposes, and rendered inaccessible by the private road or any other convenient way the residence of the plaintiffs, and also the land between the right of way of the Chicago & Northwestern Railway Company and the right of way so taken and excavated; that the plaintiffs never in any way ratified or approved of the payment of $1,766, and never accepted the same, or any part thereof, but at all times forbade the Terminal Company from entering upon the land, or the use of the same, or the excavation thereon, but the Manitowoc Terminal Company wrongfully and without authority of law, notwithstanding the pendency of such appeals, entered upon and took possession of the lands of the plaintiffs, and excavated thereon, and damaged the same, as aforesaid, unlawfully and wrongfully, and without the consent or permission of the plaintiffs.

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The complaint then alleges that May 23, 1896, said two appeals were consolidated into one action; that February 8, 1897, the venue was changed to Brown county; that the cause was tried in March, 1897, and such proceedings were had that the jury returned a verdict in favor of the plaintiffs and against the Manitowoc Terminal Company for $9,000, and that April 10, 1897, judgment was duly given and entered upon such verdict in favor of the plaintiffs and against the Manitowoc Terminal Company for $9,336.29 damages and costs; that December 4, 1897, the Manitowoc Terminal Company appealed from that judgment to this court without giving any undertaking thereon except an undertaking of $250 for the payment of costs in this court; that June 23, 1898, this court affirmed such judgment (100 Wis. 208), and thereafter the record was duly remitted to the circuit court of that county; that July 1, 1897, a transcript of such judgment was duly docketed in the circuit court of Manitowoc county; that thereupon, and on July 1, 1897, an execution upon such judgment was duly issued, and delivered to the sheriff of Manitowoc county, in which was the principal office and place of business of the Manitowoc Terminal Company at all times when it had an office or place of business, and that the sheriff was unable to find any goods, chattels, or property of any kind belonging to the Manitowoc Terminal Company, and so returned such execution wholly unsatisfied; that thereafter, upon petition of the plaintiffs therein, an order was made by the circuit court of Brown county, under sec. 3216, R. S. 1878, sequestrating the stock, property, and things in action of the Manitowoc Terminal Company, and appointing Otto A. Finck, of Milwaukee, receiver of the same, and that he thereupon qualified as such receiver according to law, and as such proceeded in the execution of his duties and trust as such receiver, and demanded the books and papers of the Manitowoc Terminal Company, and received the same, and thereupon for the first time the plaint-

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iffs became aware that the Manitowoc Terminal Company was at all times therein mentioned wholly insolvent, and that no part of its capital stock had ever been paid in, and that it had no property of any kind except the subscriptions to its capital stock, and that such subscriptions to the amount of $500 were made by five persons, who subscribed one share each and purported to pay for the same by services in organizing such corporation, and that the remainder of its capital stock, to the amount of $95,000, was, as claimed by the Manitowoc Terminal Company, to have been subscribed for, taken up, or delivered to the defendant the *Milwaukee & Lake Winnebago Railroad Company*, but the latter company denied that it had subscribed for such stock or any part thereof; that the defendants, the Manitowoc Terminal Company, the Manitowoc & Western Railroad Company, and the *Milwaukee & Lake Winnebago Railroad Company* are, and at all therein mentioned were, wholly insolvent; that, after the Manitowoc Terminal Company entered upon such lands, the plaintiffs demanded of that company to make, erect, furnish, or construct for the plaintiffs a suitable and convenient farm crossing over its road, and connecting the two adjoining pieces of lands of the plaintiffs, separated by such road, but that it failed, neglected, and refused to do so.

The complaint further alleges that the defendants the Manitowoc Terminal Company, the Manitowoc & Western Railroad Company, and the *Milwaukee & Lake Winnebago Railroad Company* were each duly incorporated as railroads under the laws of Wisconsin; that the defendants *Henry F. Whitcomb* and *Howard Morris* were receivers of the property, credits, and effects of the Wisconsin Central Railroad Company, incorporated under the laws of Wisconsin, duly appointed by the United States circuit court, September 27, 1893, in an action of John A. Stewart and Edwin H. Abbot, as trustees, against the Wisconsin Central Railroad Company, and were also thereafter duly appointed receivers of

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the Wisconsin Central Company, and duly qualified as such receivers; that July 1, 1895, the Manitowoc Terminal Company mortgaged the lands in question and other lands to said Edwin H. Abbot, to secure the payment of $500,000, well knowing that the lands so mortgaged were the property of the plaintiffs; that July 1, 1895, the Manitowoc Terminal Company attempted to convey by deed to the Manitowoc & Western Railroad Company the lands of the plaintiffs in question, which deed was recorded July 22, 1895; that both of those railroads were organized and managed by the same persons, and that they and the *Milwaukee & Lake Winnebago Railroad Company* had full notice and knowledge that the lands in question were the property of the plaintiffs prior to and at the time of taking such deed; that July 1, 1895, the Manitowoc & Western Railroad Company attempted to convey and transfer the strip of land in question, with other lands, to the *Milwaukee & Lake Winnebago Railroad Company*, so managed and controlled by the same, or many of the same, persons interested in the management of the Wisconsin Central Railroad Company, and had full knowledge and notice of the condemnation proceedings and the plaintiffs' ownership of such lands; that May 23, 1896, the *Milwaukee & Lake Winnebago Railroad Company* leased the strip of land in question to *Henry F. Whitcomb* and *Howard Morris*, as such receivers, who thereupon, as such receivers, wrongfully, and without consent of the plaintiffs, went into possession of the lands in question, and have continued in possession thereof, using and occupying the same ever since; that all of the acts and doings of the Manitowoc Terminal Company and the Manitowoc & Western Railroad Company in respect to the condemnation of the lands in question, and the transfer of the same to the *Milwaukee & Lake Winnebago Railroad Company*, were done and taken solely as the agents of the latter company; that neither of the defendants ever paid to the plaintiffs such judgment so

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affirmed by this court, or any part thereof, or the subsequent costs accrued thereon, or any part thereof, or any sum of money or thing of value whatever, as compensation for the lands of the plaintiffs so taken; that neither of the plaintiffs has ever received from any person, or in any manner, any compensation for such lands; that the plaintiffs are without adequate remedy at law in the premises; that the defendant Piening was made defendant herein merely because he was a party to the original condemnation proceedings prior to the appeal therein from the award of said commissioners, but that Piening has no interest in the lands in question or the award, and no personal claim is made against him.

Upon such complaint the plaintiffs pray judgment that the defendants, and each and every one of them, be enjoined and restrained from entering upon the land in question, or running locomotives or trains of cars over the same or any part thereof, or in any way interfering with the plaintiffs' possession and use of the same.

As indicated, the commissioners appointed in the condemnation proceedings made and filed with the clerk of the court their award to the plaintiffs of $1,766, August 6, 1895, and the Manitowoc Terminal Company immediately thereafter paid that amount to the clerk of the court for the use of the plaintiffs, and thereupon, and without the consent of the plaintiffs, or either of them, entered upon the lands so condemned, and excavated the same to the depth of thirty feet, and constructed a railroad track thereon. Within thirty days from the time of filing such award the plaintiffs and the Manitowoc Terminal Company severally appealed to the circuit court. Upon the trial of those appeals the plaintiffs succeeded in increasing such compensation or damages to $9,000. The judgment entered upon that verdict in favor of the plaintiffs was affirmed by this court. 100 Wis. 208. It appears that no part of that judgment has ever been paid, and that the plaintiffs have exhausted all their remedies at

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law for the collection of the same. The question recurs whether the plaintiffs can maintain this action to restrain the defendants from running their trains and locomotives over the strip of land in question, and from interfering with the plaintiffs' possession and use of the same. Before determining this question, it may be well to consider the provisions of our constitution as construed by the courts.

The constitution provides that "the property of no person shall be taken for public use without just compensation therefor." Sec. 13, art. I, Const. Wis. In considering that section, the supreme court of the United States has held that: "The constitutional provisions of the United States and of the several states which declare that private property shall not be taken for public use without just compensation were intended to establish this principle beyond legislative control." *Pumpelly v. Green Bay Co.* 13 Wall. 166. In one of the earliest decisions of this court it was held that: "Before any *permanent* occupation or possession can be taken or had of lands required for railroad purposes, such compensation therefor as may have been agreed on between the company and the landowner, or ascertained according to the provisions of the charter, must be actually paid or tendered." *Milwaukee & M. R. Co. v. Eble*, 3 Pin. 334. To the same effect, *Thien v. Voegtlander*, 3 Wis. 461; *Pratt v. Brown*, 3 Wis. 603; *Norton v. Peck*, 3 Wis. 714; *Shepardson v. M. & B. R. Co.* 6 Wis. 605. In this last case an act of the legislature was held to be invalid because it authorized the taking without making compensation therefor or providing the means by which compensation could be obtained. In that case, WHITON, C. J., speaking for the court, said: "Admitting that the court has the power to issue a writ of *mandamus* to compel a private corporation to perform a duty enjoined upon it by law, we still think that the owner of property which is taken for public use should not be compelled to resort to such a proceeding to obtain com-

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pensation." See *Hood v. Finch*, 8 Wis. 381; *Powers v. Bears*, 12 Wis. 214; *Newell v. Smith*, 15 Wis. 101. In this last case a statute was held void which required payment to be made to the owner of "the value of the land, to be ascertained by the verdict in an action of trespass." See *Pomeroy v. M. & C. R. Co.* 16 Wis. 640; *Loop v. Chamberlain*, 20 Wis. 135.

It logically follows from these adjudications that the compensation required by the constitution must not only be agreed upon or ascertained as prescribed by law, but actually paid, or tendered, or deposited as required by law. The statutes of this state do not seem to contemplate the acquisition of any permanent right in the land condemned until the damages, as finally determined, are either paid or the payment provided for as prescribed by law. Thus our statute provides, in effect, that upon the award being filed, and the amount thereof being deposited with the clerk, the corporation is entitled to a writ of assistance, when the owner has appealed, only upon "giving security in such additional amount as the court or judge shall require to pay any judgment that shall be recovered against it on appeal." Sec. 1850, Stats. 1898. The same statute further provides that: "If such corporation be in possession . . . of such land pending an appeal the owners . . . shall be entitled to receive the money paid into court on account of the award appealed from, *without prejudice to the appeal taken.*" So it provides that: "If such corporation shall omit for the space of sixty days to pay . . . the amount of any *final* judgment which shall be rendered upon an appeal from such award, the party interested in such award or judgment, may have execution upon said judgment without motion, or for the amount of such award upon motion." Another statute provides that: "When, after the determination of such appeal, the railroad corporation shall have paid into court the amount of the judgment rendered thereon, . . . the clerk

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of said court shall make a minute of such payment," etc., "and thereupon the exclusive use of said premises and every part and parcel thereof shall vest in such corporation, its successors and assigns, so long as used for railroad purposes, without any other or further act, deed or conveyance." Sec. 1851, Stats. 1898. So the statute provides, in case of defective title, in effect, that the corporation is only to have possession "on its paying into court a sufficient sum or giving such security as such court or judge may direct to pay the compensation therefor when *finally ascertained;* . . . but no injunction to restrain the completion or operation of the road shall be granted *until such compensation has been fixed and determined.*" Sec. 1852, Stats. 1898. The manifest implication is that, if such compensation is not so paid or provided for when so "finally ascertained," then an injunction may be granted restraining the completion or operation of the road. This implication is in harmony with the decisions of this court. *Bohlman v. G. B. & M. R. Co.* 40 Wis. 157–169; *Sherman v. M., L. S. & W. R. Co.* 40 Wis. 645; *Gilman v. S. & F. du L. R. Co.* 40 Wis. 653. In the first of these cases it was said by Chief Justice RYAN, speaking for the court: "It is a very easy thing for the respondent to acquire the right of way over the appellant's land, making just compensation to him according to the constitution and the statutes. In the meantime, let the consequences be what they may, the appellant is entitled, *ex debito justitiæ*, to the judgment which he seeks," — which was an injunction restraining the company from constructing its road on the land. In the last case cited the landowner had recovered a judgment for damages for the land taken, and while it remained unpaid the railroad company mortgaged the road, including the lands so taken, and that mortgage was foreclosed, and the purchasers at the foreclosure sale organized a new corporation under the statutes, which new corporation, with knowledge of the facts, continued to operate its

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road over the land so taken; and it was held that equity would restrain the new corporation from further maintaining and operating its road over such land, *except upon payment of such judgment against the old corporation.*

The only question we have had as to the right of the plaintiffs to this equitable relief is whether they have not an adequate remedy at law by an action of ejectment. In such an action a recovery may be had, not only of the property and possession, but also of damages for the withholding of such possession. Sec. 3073, Stats. 1898. But after carefully considering the allegations of the complaint we are satisfied that the plaintiffs in this action have no such adequate remedy. It will be observed from the statement made that the plaintiffs never voluntarily relinquished the possession of the land, nor consented to the excavations made, nor to the construction of the railroad upon the same. We must hold that the complaint states a good cause of action for such equitable relief.

Counsel further contends that the complaint is defective in not alleging that permission was obtained from the federal court appointing such receivers to commence and maintain this action in the state court. It is enough to say that the statutes of the United States expressly authorize the commencement of an action against receivers or managers of any property who have been appointed by any federal court in respect to any of their acts or transactions "in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed." 24 Stats. at Large, 554, ch. 373, sec. 3; *McNulta v. Lochridge*, 141 U. S. 327; *Texas & P. R. Co. v. Johnson*, 151 U. S. 81. Besides, the right to maintain this action is governed by the laws of this state.

*By the Court.*— The order of the circuit court is affirmed.

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LAACK, Executrix, Plaintiff in error, vs. RUNGE, Defendant in error.

*September 5—September 26, 1899.*

*Evidence: Transactions with persons since deceased.*

Unless a witness is a party to the action, or is in fact the real party in interest, or is a person through or under whom the party offering his testimony derives his interest or title, secs. 4069, 4070, Stats. 1898, do not make him incompetent to testify as to transactions had by him personally with a person since deceased, through whom the opposite party claims.

ERROR to review a judgment of the circuit court for Sheboygan county: N. S. GILSON, Circuit Judge. *Affirmed.*

This was an action brought by the plaintiff in error in her capacity as executrix of the will of her husband, Henry C. Laack, deceased, for goods, wares, and merchandise sold by him to the defendant in error to the amount of $64.50. The answer admitted the representative character of the plaintiff, the purchase of the goods and the value thereof, and alleged payment therefor. Upon the trial in the circuit court the only issue was upon the question of payment. Upon this issue the defendant produced the testimony, which was received against objection, of one Radloff, who testified that he had a contract with Henry C. Laack, deceased, to erect for him a hotel building; that *William Runge* worked for him in the construction of the building, and that he had an arrangement with Laack by which Laack sold to *Runge* and other workmen goods out of his store, and was to receive his pay from Radloff for such sales by deducting the bills from the amount due Radloff upon his contract; that in pursuance of that arrangement the amount of the bill of goods sold to *Runge* was taken out of the contract price of the hotel, when he (Radloff) settled with Laack. The jury rendered a verdict for the defendant, and the plaintiff sued out a writ of error.

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*A. C. Shaw*, for the plaintiff in error.

*M. C. Mead*, for the defendant in error, to the point that the mere fact that a witness has an interest in the result of the action, if not affected by the judgment, does not render him incompetent, if he is not a party to the suit, cited 3 Jones, Ev. § 791; Greenl. Ev. § 390; *Eisenlord v. Clum*, 126 N. Y. 555; *Hobart v. Hobart*, 62 N. Y. 80; *Nearpass v. Gilman*, 104 N. Y. 506; *Wallace v. Straus*, 113 N. Y. 238; *Connelly v. O'Connor*, 117 N. Y. 91; sec. 4068, Stats. 1898.

WINSLOW, J. The only question presented by the record is as to the admissibility of the testimony of the witness Radloff. The plaintiff in error claims that under secs. 4069, 4070, Stats. 1898, Radloff could not testify as to any transactions had by him personally with the plaintiff's testator. It is difficult to see upon what basis this contention rests. The sections named simply forbid the examination of *a party* to the action, or any person through or under whom a party derives his interest or title, as to transactions or communications had by him personally with a deceased or insane person through whom the opposite party claims or defends. Unless the witness is a party to the action, or is in fact the *real party in interest* (*Wright v. Jackson*, 59 Wis. 577), or unless he is a person through or under whom the party offering his testimony derives his interest or title, his testimony is not barred by the statute. Radloff is not a party to the action, nor does he stand in the relation of a real party in interest who will be bound by the judgment, nor does the defendant derive any interest or title through him; hence his testimony was admissible. If Radloff be considered as the agent of defendant in making the payment, his testimony would still be admissible. *Hanf v. N. W. M. A. Asso.* 76 Wis. 450.

*By the Court.*— Judgment affirmed.

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LEWIS, Respondent, vs. THE AMERICAN SAVINGS & LOAN ASSOCIATION and others, Respondents, and HALE, Receiver, Appellant.

*September 5 — September 26, 1899.*

*Lewis v. American S. & L. Asso.* 98 Wis. 203, followed.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

WINSLOW, J. This is an appeal by the defendant *Hale*, as receiver, from a judgment dismissing his counterclaim. The sufficiency of this counterclaim was passed upon by this court when the case was here upon appeal from the order sustaining a demurrer thereto. *Lewis v. American S. & L. Asso.* 98 Wis. 203. When the case was remitted to the trial court the defendant *Hale* elected to stand upon his counterclaim, and thereupon the judgment was rendered from which this appeal is taken. It is unnecessary to restate the grounds upon which the counterclaim was held insufficient. They will be found fully stated in the former opinion, which may be regarded as expressing our present views; and for those reasons the present judgment must be affirmed.

*By the Court.*— Judgment affirmed.

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IN RE WILL OF MADDEN: MACKIN, Administrator, Appellant, vs. MADDEN, Respondent.

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Case 2
116 3533

*September 6 — September 26, 1899.*

(1) *Appeal: Notice: Service on clerk.* (2, 3) *Estates of decedents: Expenses of administration: Homestead: Wills.*

1. A notice of appeal to the supreme court, delivered to the clerk of the circuit court for the purpose of complying with the appeal statute on that subject and having such notice filed and certified to this court as part of the record on appeal, which is so filed and returned,

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satisfies the statutory requisites of such an appeal as regards the serving of notice on such clerk and the return thereof to this court; and the clerk's filing on such notice sufficiently proves the facts. BARDEEN, J., dissents.

2. Expenses of administration may be made a charge on the homestead by will, subject to widow's rights to be asserted at her election.

3. If a testator, by will, make debts and legacies a charge on his homestead, requiring its conversion into money for their payment, there being no other property out of which to pay the same or the expenses of administration, the payment of such expenses out of the fund derived from such sale will be deemed, by implication, to have been contemplated by the testator and made a charge upon such fund.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Fond du Lac county: N. S. GILSON, Circuit Judge. *Reversed.*

Patrick Madden, deceased, willed his property as follows: To his wife for life, remainder over, one half of the real estate to *Phillip Madden* without incumbrance, $100 to his daughter, Elizabeth Coleman, $5 to Andrew Madden, and the rest and residue, after the payment of all of his debts, to Mary Ann Brown. Substantially all the property possessed by the testator at the time of his death was a homestead incumbered by a mortgage. The will was duly admitted to probate, and the widow elected to take under it. Claims were allowed against the estate to the amount of $42.50, but there was no property with which to pay them or the expenses of administration, unless the property left to Mary Ann Brown was liable therefor. The probate court was petitioned for a license to sell the interest of Mary Ann Brown to obtain money to pay the claims allowed against the estate and the expenses of administration, which was granted as to such claims, but denied as to such expenses. The administrator appealed from such determination to the circuit court, where it was affirmed, and from the judgment of affirmance he appealed to this court.

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For the appellant there was a brief by *Duffy & McCrory*, and oral argument by *J. H. McCrory*.

For the devisees there was a brief by *E. Blewett* and *D. D. Sutherland*, and oral argument by *Mr. Blewett*.

MARSHALL, J. A motion was made by the respondent for a dismissal of the appeal because there was no proof on file of service on the clerk of the circuit court of the notice of appeal. A proper notice of appeal was found in the record certified to this court, with the usual filing thereon of the clerk of the lower court. It was urged that the statute requires a service of the appeal notice on the clerk of the circuit court where the judgment appealed from was entered, by delivering to such clerk, and leaving with him, a true copy thereof, and proof thereof, together with the original notice, to be duly certified to this court. To support such contention respondent's counsel cited *Yates v. Shepardson*, 37 Wis. 315, where a notice of appeal was not delivered to or filed with the clerk of the trial court; also *Eureka S. H. Co. v. Sloteman*, 67 Wis. 118, where the notice was not delivered to the clerk for the purpose of complying with the appeal statute, but was filed with him pursuant to a *nunc pro tunc* order of the trial court; and *North Hudson M. B. & L. Asso. v. Childs*, 86 Wis. 292, where the notice of appeal was neither directed to nor delivered to the clerk of the trial court. It will be observed that neither of such cases is similar in its facts to the one before us. Here a notice of appeal duly directed to the clerk of the trial court was delivered to him for the purpose of complying with the appeal statute, and was filed and returned by him to this court as a part of the record. Sec. 3049, Stats. 1898, provides that an appeal must be taken by serving a notice in writing on the adverse party and on the clerk of the circuit court in which the judgment or order appealed from is entered; and sec. 3050 provides that the clerk shall in all cases transmit to the supreme court the

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notice of appeal. It is considered that if a notice of appeal, made and directed as required by the statute, is delivered to the clerk of the trial court for the purpose of making the requisite service on him and having such notice filed and returned as part of the record on appeal, and it is so filed and returned, the calls of the statute in regard thereto are amply satisfied, and the notice, with the clerk's indorsement thereon, shows *prima facie* the jurisdictional requisite as to such service.

It would require an exceedingly strict construction of the statute to reach the conclusion that there must be a notice of appeal served by copy on the attorney for the adverse party and on the clerk of the trial court, and that such notice, with proof of such service, must be filed with such clerk and by him certified to this court in order to confer jurisdiction upon it. The delivery to the proper clerk of a notice of appeal for the purpose of complying with the appeal statute, constitutes a literal compliance therewith, and the clerk's filing thereon sufficiently proves the service. The return of the notice served and filed complies, literally, with the statute requiring the notice of appeal to be so returned. The motion to dismiss the appeal is denied.

The only error assigned on the merits of the appeal is the denial of payment of the expenses of administration out of the proceeds of the sale of one half of the real estate, after the expiration of the life estate of the wife of the testator. To support the decision of the trial court reliance is placed on secs. 2271, 2280, Stats. 1898. The first section provides that when a homestead shall not have been devised by the owner it shall go to certain designated heirs free from all claims against the estate except mortgages lawfully executed thereon and laborers' and mechanics' liens. The second section provides that 'when the homestead shall have been disposed of by will the devisee shall take the same free from all judgments and claims against the testator or

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the estate, except mortgages lawfully executed thereon and mechanics' and laborers' liens, provided further that in the event of there being no widow or minor child, or other property than the homestead sufficient to pay the expenses of the last sickness, the funeral expenses, and the costs and charges of administering the estate, the homestead shall be liable therefor; and provided further, that if the testator shall leave no widow, child or grandchild, nor other property sufficient to pay his debts and liabilities, the homestead shall be liable therefor.' Neither of such sections goes further than to indicate the general policy of the law regarding the homestead, governing cases where a different disposition of it is not made by the testator. The first section does not apply because the deceased died testate; the second section does not govern if the testator expressly or by necessary implication charged the homestead with the payment of the expenses of administration. There is nothing in the statutes depriving a person of the right to dispose of his homestead by will in any way he sees fit, subject to widow's rights to be asserted at her election. That right carries with it the power to subject the devised estate to such conditions as the testator may see fit to impose, such as the payment of debts or the expenses of administration. *Turner v. Scheiber*, 89 Wis. 1. The law in that regard was understood by the trial court, hence his decision that the interest in the homestead devised to Mary Ann Brown was subject to the debts of the deceased because charged upon it by the testator, in the light of a proper construction of the will, but otherwise, the expenses of administration.

Expenses of administration constitute a charge of the highest character against the estate in which they are incurred. They take precedence of debts, even of such as grow out of the last sickness, unless otherwise provided by statute. Woerner, Administration, §§ 356, 362. Such expenses are a necessary incident to the carrying out of the



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purpose of the testator, without which such purpose would be quite likely to fail in whole or in part. When the will requires a full administration of the estate and the conversion of some part of it into money for the payment of debts and legacies, it must be presumed that the incidents of such purpose were in the mind of the testator when the will was drawn and were provided for by the will, in the absence of some clear language indicating a contrary intent. When a homestead is devised and nothing said about the payment of expenses of administration, no presumption can be indulged in of a right to charge such homestead therewith, because by the will and under the statute the property in such a situation goes directly to the devisee without the right of possession or control vesting in the executor at all; but where the will requires a sale of the homestead and a distribution of the proceeds in the payment of debts and legacies, thereby requiring a conversion of realty into personalty in the hands of the executor, it must follow that the necessary condition of such a situation will attach to such money, namely, the payment of the expenses of administration, precedent to the rights of the beneficiaries of the fund, and that such was the testator's will.

It follows that the will in question, properly construed, charges the estate in remainder not devised to *Phillip Madden* with the payment of the legacies mentioned in the will and the debts of deceased and expenses of administration, and that the latter take precedence of such debts and legacies.

*By the Court.*— The judgment of the circuit court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

BARDEEN, J. I respectfully dissent from that portion of the decision in this case which denies the respondent's motion to dismiss the appeal. It is conceded that the record

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fails to show any service of the notice of appeal upon the clerk of the court in which the judgment appealed from was entered. The service of such notice was an essential requisite of the appeal,— made so by the statute, in language as plain as printed words can make it. Sec. 3049, Stats. 1898, says: "An appeal *must* be taken by *serving* a notice in writing, signed by the appellant or his attorney, on the adverse party and *on the clerk of the court* in which the judgment or order appealed from is entered." Presumably, the requirement that the notice should be served upon the clerk was put into the statute for some useful purpose. Sec. 2820 provides that such service may be made by delivery of a copy thereof to the clerk, or, if not found, at his office or residence. Respondent's motion is based upon the fact that no such service has been made. *Yates v. Shepardson*, 37 Wis. 315, cited in the opinion, holds distinctly that cases can only be brought to this court by appeal in the manner prescribed by the statute. When the record fails to show compliance therewith, unless such proof is furnished, clearly the appeal should be dismissed. If the record fails to show such a notice given, the presumption is that such notice was *not* given. If the legislature meant that filing the original notice with the clerk was sufficient notice to him, it would have been an easy matter to have said so. *They did not say so.* They said the appeal must be taken by service of a notice in writing upon the clerk. *Filing* an original notice with him is no more a service upon him than it would be service on the attorney. He is made the legal custodian of the papers in the case, and they are to be filed with him after the usual steps have been taken to secure jurisdiction. To say that such filing is to be deemed equivalent to service upon him is contrary to the express requirements of the statute, and repugnant to all rules of practice in such cases. Against this construction of the law I desire my protest to be entered.

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BALDWIN and others, Respondents, vs. CORNELIUS, Appellant.

*September 6 — September 26, 1899.*

*Instructions to jury: Evidence: Issues.*

1. The only issue being as to which of two rules for scaling logs was to have been used under an oral contract of sale, and there being no impeachment of the fairness of the scale made, it was error to submit to the jury the question of the accuracy or correctness of that scale.
2. If, in such a case, it had been agreed that the logs should be scaled according to the rule contained in a certain book possessed by one of the parties, and they were so scaled, it was immaterial whether said party had read the rule and knew its terms, or what his belief was as to the rule contained in the book,— no question of mistake or deceit being involved.

APPEAL from a judgment of the circuit court for Sheboygan county: N. S. GILSON, Circuit Judge. *Reversed.*

The complaint alleges, in substance, that the plaintiffs sold defendant all the oak and basswood timber on certain lands owned by plaintiffs at the agreed price of $8 per 1,000 feet for red oak and $6 per 1,000 feet for white oak and basswood, to be scaled in the woods and before the logs were hauled; that defendant entered upon the premises and cut 69,408 feet of white oak, 51,554 feet of red oak, and 11,860 feet of basswood; that defendant had paid on account thereof $740.65, and yet owed plaintiffs $159.05, for which judgment was demanded. Defendant's answer admitted the purchase and terms, and denied the measurements claimed. He alleged the cutting of only 57,863 feet of white oak, 41,683 feet of red oak, and 9,973 feet of basswood, and the payment in full therefor, being the sum of $740.65, and that plaintiffs accepted and received said sum in full satisfaction thereof.

The trial resulted in a verdict for the plaintiffs for $101.10

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damages, and from a judgment entered thereon the defendant appeals.

*M. C. Mead*, for the appellant.

*A. C. Shaw*, for the respondents.

BARDEEN, J. Upon the trial the plaintiffs claimed that it was agreed that the logs in question were to be scaled by the Scribner log rule, whereas they were in fact scaled by the Doyle rule, without their knowledge or consent; that, after the logs had been hauled to the mill, they caused a scale to be made by the Scribner rule, which resulted in a material increase in the amount of logs over the scale made by the defendant. The figures given in the statement of facts show the two scales. The defendant insisted that the Scribner rule was not agreed upon; that at the time of the agreement the plaintiff *Lottie Baldwin*, who conducted the negotiations, had a book called "Scribner's Lumber and Log Book," and said, if the scale was made according to that book, it would be all right; that the book mentioned contained no other than "Doyle's rule" for the measurement of logs, and that he used the Doyle rule in scaling the logs, with plaintiffs' knowledge. Thus the issue was sharply presented as to which rule was to have been used. The evidence shows that logs scaled by the Scribner rule will somewhat overrun a scale of the same logs by the Doyle rule. There can be no doubt of the proposition that if it was agreed that the Scribner rule should be used, and a different rule was used, which resulted in showing a smaller quantity of logs, in absence of any element of accord and satisfaction the defendant would be liable for the difference. The plaintiffs were entitled to pay for the logs according to the rule agreed upon.

The complaint contains no allegation attacking the scale made by the defendant; neither is there any evidence in the record which impeaches such scale. It is true that *Miss*

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*Baldwin* testified in one place, "I know he measured out some part of the logs for sap on some." Another witness also stated: "Well, he took out on most of them just the sap; measured inside of the sap; about half an inch in from the bark, on each side of the log. This he did on sound logs." Upon cross-examination this witness stated that he was present only twice, for a little while at a time, and had never scaled logs before. Such testimony as this would hardly be sufficient to raise a suspicion against the scale. It afforded no basis for a jury to act upon. There had been no scale by the Doyle rule save that made by the defendant; no allegation that his scale had not been proper and fair; no evidence from any person who had had experience in scaling that the logs had not been fairly scaled.

As before stated, the real issue was whether the Scribner rule or Doyle rule, as shown by the book mentioned, was to have been used. This issue the court submitted to the jury, and among other instructions gave the following: "If it was agreed that the logs were to be scaled according to the rule contained in the book possessed by *Miss Baldwin* (Exhibit 1), and she had read the rule and knew what the terms of the rule were, then the scale therein contained is the one to be used in ascertaining the number of feet of the logs." This instruction is palpably bad. If the agreement was that the logs were to be scaled according to the rule contained in the book, then it made no difference whether *Miss Baldwin* had read the rule, or knew the terms of the rule, or not. To put any such limitation upon the instruction was without warrant in the testimony, and prejudicial to the defendant. After telling the jury to determine which rule was to have been used, the court further said: "If the measurement of the logs was to be made according to the rule in this book, then was the scale made by the defendant a correct and accurate one?" In another place he tells the jury that the burden of proof is upon the plaintiffs to show

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that the Scribner, and not the Doyle, rule was to have been used, "and unless they have shown that by a preponderance of the evidence they are not entitled to recover unless the evidence shall further satisfy you that the defendant, in making a scale of these logs, did not do so accurately and correctly." In several other places in the charge the court lays stress upon the question of whether defendant had made a fair scale or not. As we have already seen, the evidence is barren of any fact that would sustain a finding impeaching the defendant's scale. The evidence shows without contradiction that during the progress of the work defendant furnished scale sheets, showing the amount of his scale, and sent checks in payment of the amounts shown thereby, which were accepted and retained by the plaintiffs without objection. It further shows that during the progress of the work the plaintiff *Lottie*, who had the matter in charge, was present in the woods a greater portion of the time while the scale was being made, and attempted to make a scale of the logs with a rule, in connection with her book, and kept an account of the logs in a book, which was produced at the trial. The defendant marked the amount of each log on the end, which amount the plaintiff also entered in her book. She had before her at all times her own record as well as the scale sheets which were furnished her. She knew that under the contract the logs were to be scaled in the woods before they were hauled; that, if she was dissatisfied with the scale, she had a right to take a scaler in the woods; and that defendant had informed her she might get the state scaler to scale the logs. She had accepted and retained the scale sheets and checks in payment of the logs without objection, and, if the Doyle rule was to govern, she was in no position where she could impeach the scale. Under the evidence we are clearly of the opinion that the plaintiffs had no standing in court except upon the question of whether the Scribner or Doyle rule was to control, and

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for the court to submit to the jury the accuracy or correctness of the defendant's scale was error.

The court permitted the witness *Lottie Baldwin* to answer a question as to whether she *believed* that the book she had contained the Scribner rule. This was of questionable propriety. Her belief as to the matter under consideration was wholly immaterial. The real question was, What was the contract? not what she may have believed or thought. The plaintiff was not seeking a recovery upon the grounds of deceit or mistake. The case presented a plain issue of fact, concerning which the motives or beliefs of the parties were of no consequence.

*By the Court.*— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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## In re Will of Somervaill.

*September 6 — September 26, 1899.*

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*Appeal from county court: Executors: Undertaking: Jurisdiction.*

Until the person named in a will as executor has fully qualified as such and been confirmed in his office he is not an executor within the meaning of sec. 4032, Stats. 1898, so as to be exempt from giving an undertaking on appeal.

Appeal from a judgment of the circuit court for Fond du Lac county: N. S. Gilson, Circuit Judge. *Reversed.*

For the appellants there was a brief signed by *Swett & Ecke*, attorneys, and by *Maurice McKenna*, guardian *ad litem*, and the cause was argued orally by *O. H. Ecke* and *H. E. Swett.*

For the respondent there was a brief by *Giffin & Sutherland*, and oral argument by *D. D. Sutherland* and *E. S. Bragg.*

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DODGE, J. *William McDermott*, named as executor and also as principal beneficiary, by a petition which did not indicate in which capacity, propounded a will for probate, which was denied, the county court finding the instrument not to be the last will and testament of the deceased. Thereupon attorneys filed a notice of appeal on behalf of "*Wm. McDermott*, named as executor" in the proposed will, and served the same as directed by order of the county court, but did not file any undertaking. The circuit court reversed the decision of the county court, and admitted the will to probate, from which judgment this appeal is taken.

The appellants here contend, as they did below, that the appeal to the circuit court was ineffectual for want of an undertaking, and that the circuit court was without jurisdiction by reason of sec. 4032, Stats. 1898, which provides that the party appealing, *other than an executor, administrator, guardian, or trustee*, shall, before his appeal shall be effectual for any purpose, file an undertaking. *Thompson v. Thompson*, 24 Wis. 515; *Drinkwine v. Eau Claire*, 83 Wis. 428. It is contended by the respondent here that he, being so named in the proposed will, was an executor, for the reason that executors derive their existence as such, not from the order of the county court, but from the will itself. This position, in ancient times, was undoubted, and the power of the executor differed but little before and after probate; indeed, he was looked upon as a creation of the testator, his powers resting upon the will as an instrument *inter partes*, and not upon authority derived from the ecclesiastical court. Schouler, Ex'rs, § 137; 1 Williams, Ex'rs (4th Am. ed.), 239, 240. The tendency of more modern decisions and statutes, however, is to contemplate the executor as dependent upon the court for his official existence. Although for his appointment he looks primarily to the will, that appointment is in many authorities said to be ineffectual until the confirmatory action of the court is had. Mr. Schouler (Ex'rs,

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§ 52) says: "The full appointment, according to modern English and American practice, comes from the court of probate jurisdiction, which, recognizing and confirming the testator's selection, clothes the executor with plenary authority by issuing letters testamentary to him. . . . Hence, according to our present probate procedure, an executor derives his office (1) from a testamentary appointment, which (2) is confirmed by a decree of the probate court and issuance of letters testamentary to him accordingly." In 11 Am. & Eng. Ency. of Law (2d ed.), 744, it is said: "An executor, according to the common-law doctrine, derives his office solely from the will and not from the probate, which is held to be only evidence of his right. In many, if not all, the states of the Union, the authority of an executor, while derived primarily from the will, is not derived solely therefrom, and is not complete until the executor has qualified by complying with certain statutory requirements and has received letters testamentary from a court of competent jurisdiction." In *Millay v. Wiley*, 46 Me. 230, it was said that the following prerequisites seem to be necessary to constitute a person an executor: "(1) The probate of the will; (2) competency in the opinion of the probate judge; (3) acceptance of the trust; (4) delivery of a bond to discharge the same; and (5) reception of letters testamentary." In *Hatheway v. Weeks*, 34 Mich. 237, 243, it is said: "The executor or administrator is a mere officer of the law." In *Stagg v. Green*, 47 Mo. 500, it was held that the mere fact that a person has been named executor in a will does not make him an executor, but only gives him the right to become such on complying with the conditions required by law. See, also, *McKeen v. Frost*, 46 Me. 239; *Lamb v. Helm*, 56 Mo. 420; *Gilkey v. Hamilton*, 22 Mich. 283; Schouler, Ex'rs, § 137.

Respondent argues that there are still many acts which one named as executor may do before issuance of letters to him which will bind the property or estate. So, also, many

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acts by others having some sort of moral relation to the estate are held binding on it; such as incurring funeral expenses by relatives, preservation of property, and even in some instances disposal of property and payment of debts, where done in good faith and justified by peculiar circumstances. Schouler, Ex'rs, §§ 194, 195. While it is perhaps neither easy nor necessary to define how much, it is certain that the almost complete common-law powers of one named executor before probate have been greatly curtailed both by the letter and the policy of the modern statutes vesting in certain courts control over estates of testators. Even vesting of title is now dependent on the probate. Sec. 2294, Stats. 1898; *Melms v. Pfister*, 59 Wis. 186. Our own statutes go quite as far in this direction as any, and, after imposing on the person named executor the single duty of promptly presenting the will for probate, and regulating the manner in which authority from the court may be obtained, provide (sec. 3794, Stats. 1898), that he shall give bond "*before he shall enter upon the execution of his trust.*" In *Batchelder v. Batchelder*, 20 Wis. 452, it is held he is not exercising any trust until that has been done.

It is, however, not important to consider what, if any, acts are valid and binding when done by one named executor which would not be so if done by one not so named. Nor are decisions from other states in that line of much significance upon the question before us, which is merely one of statutory construction,—What did our legislature mean in the use of the word "executor" in this section, where it is coupled with "administrator," "trustee," "guardian," etc.? It is to be observed that in the statutes imposing duties on one named in a will before he has been fully installed in the position by his letters testamentary the expression used by the legislature is, "the person named as executor," and in substantially all cases where the word "executor" is used its obvious significance is an executor confirmed by appointment and fully installed in his office. Sec. 3805, Stats. 1898,

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provides that the word "executor," where used, shall include an administrator with will annexed, who cannot be such without issue of letters. It is clear that the original exemption of executors, etc., from bond on appeal (secs. 20, 21, ch. 101, R. S. 1858) contemplated only those who had fully qualified, for no hearing or decision on claims could be had till after letters testamentary had issued. The revisers of 1878 say that the exemption in sec. 4032 was but a retention of the idea embodied in the statute of 1858, extended to other appeals. The reason that such officers are exempted from bond or undertaking is that they are already under bonds,—*Stinson v. Leary*, 69 Wis. 269,—a reason which would exclude respondent.

In the light of all these considerations we cannot avoid the conclusion that the "executor" mentioned and favored by sec. 4032 is one who, like the administrator mentioned in the same connection, is such in full compliance with our statutes; that not until the person nominated by the will to be executor has satisfied our statutes and the county court, and been confirmed in his office, is he entitled to appeal without undertaking. This view is necessarily fatal to the jurisdiction of the circuit court.

*By the Court.*— Judgment of the circuit court is reversed, and cause remanded with directions to dismiss the appeal from the order and judgment of the county court.

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BEHL, Appellant, vs. SCHUETT and another, Respondents.

*September 7—September 26, 1899.*

*Duress of imprisonment: Abuse of process: Note given in settlement: Instructions to jury.*

1. A charge stating fairly the claims of the respective parties in accordance with the evidence is *held* not to have been erroneous as likely to mislead the jury into supposing it to be a statement of facts proven.

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2. Bringing an action for malicious prosecution and securing the defendant's arrest in bad faith and merely to coerce a settlement regardless of the fact whether a cause of action exists or not, is an abuse of process, even though the process be valid on its face; and a settlement so induced will be vitiated by the duress if that was reasonably adequate to overcome the will of the defendant and did overcome it.
3. The question being whether a note given by defendant to settle an action for malicious prosecution had been obtained by duress of imprisonment, the fact that bail had been fixed at an apparently excessive sum and had so remained was a fact properly to be considered by the jury, as having rendered successful duress easier of accomplishment, although such bail was fixed by a court commissioner and not by plaintiff.
4. The refusal to give special instructions as requested is not error where, so far as they were material and correct, they were fairly covered by the general charge.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This is an action upon a promissory note dated February 23, 1893, for $237.50, signed by the defendants, payable to the order of the plaintiff ten days after date. The defense was that the note was obtained by the plaintiff by means of duress of imprisonment. The evidence in support of this defense will be found substantially stated in the report of this same case, 88 Wis. 471, when it was here upon the previous appeal, and it is therefore unnecessary to restate the facts here. The jury returned a verdict for the defendants, and the plaintiff appeals.

*J. J. McAuliffe* and *C. W. Briggs*, for the appellant.

*George W. Sloan*, for the respondents.

WINSLOW, J. The only errors claimed relate to the charge of the court. These will be considered.

The court stated to the jury the claims of the defendants in the following terms: "They claim, among other things, that the plaintiff and his wife — that is, *Mr. Behl* and his wife —

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brought an action in 1893 against the defendant *William Christian* for malicious prosecution, laying their damages in that action at the sum of $20,000; that they procured a warrant of arrest in that action from a court commissioner of Milwaukee county for the arrest of *William Christian*, with directions to hold him to bail in the sum of $10,000; that such warrant was placed in the hands of the sheriff of Dodge county, where *Mr. Christian* resides, with instructions to arrest and take him to the city of Milwaukee by early morning train on February 23, 1893; that the sheriff did arrest him at 3 o'clock in the morning of that date, and took him to the city of Milwaukee by early train, where it was more difficult for him to consult or communicate with his friends and to obtain bail than it would have been if he were at home; that at Milwaukee he was at once taken to the office of the plaintiff's attorney in that action, and there had an interview with the plaintiff and his attorney. *Mr. Christian* claims that in that interview the plaintiff, or his attorney, or both, refused to accept sufficient bail which he offered, and refused to give him an opportunity to get other bail, but that they insisted that he must settle or go to jail; that he was thus made to believe that he must settle in order to avoid going to jail, and that therefore, and so believing, he did settle, and gave the note in suit. The plaintiff claims that the note was given voluntarily by *Mr. Christian* and *Mr. Schuett*, without any fraud or duress, and for the purpose of settling or compromising the action which was then pending against the defendant *Christian*."

This seems to be a substantially fair statement of the defendants' claims, but it is said that it might be misleading, because the jury might consider it as a statement of facts proven, rather than simply of claims made. This position, however, is not tenable, because the court distinctly told the jury that the defendants "claim" these to be the facts. Exception was taken specially to that part of the foregoing

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instruction which says that the defendants claim that the plaintiff and his attorney refused sufficient bail which was offered, and refused to give the main defendant an opportunity to get bail, because it is said that there is no evidence that sufficient bail was offered. The evidence of the defendant *Schuett*, however, is to the effect that he offered to sign the bond himself, and offered to procure another signer, either by telegraphing or going to Watertown, but that the plaintiff's attorney refused to wait, and told them that bonds must be given at once, or that *Christian* must go to jail or settle. This evidence seems to justify the instruction.

Error is also claimed because the court told the jury, in substance, that if *Behl* was prosecuting the former action *in good faith*, and *Christian* compromised it by giving the note without fraud or undue advantage being taken of him, then the defendants are liable. It is said that there was no question as to the good faith of the former action in the case. In this position the appellant is clearly in error. The principal question in the case was whether *Behl* was prosecuting the former action in good faith to collect damages, or whether he had brought it and secured *Christian's* arrest in bad faith and simply in order to coerce a settlement regardless of the fact whether he had any good cause of action or not. If such was his purpose, then the process of the court was abused, even though the process was valid on its face; and a settlement so induced will be vitiated by the duress if the evidence shows that the duress was reasonably adequate to overcome the will of the defendant and did overcome it. *Heckman v. Swartz*, 64 Wis. 48.

Error is also claimed because the court gave the following instruction: "One of the facts and circumstances which you may consider in this case, in determining whether or not the note and money were obtained by fraud and duress, is the fact that the order of arrest mentioned required that the defendant *William Christian* should be held to bail

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in the sum of $10,000." In support of this exception it is said that the amount of bail was fixed by a court commissioner, and not by the plaintiff, and hence that the question of the amount is not a proper subject of consideration, because the plaintiff is not responsible for the amount at which it was fixed. It is certainly true that the plaintiff does not fix the amount of the bail, and hence cannot be held responsible because it may have been excessive, at least in the absence of collusion between himself and the officer; but still the fact that the amount was fixed by the officer at an apparently excessive sum, and so remained, is certainly a fact which rendered it far more difficult for the defendant to secure bondsmen, and thus rendered successful duress by the plaintiff much easier of accomplishment; and in this view of the case it was a fact entitled to be considered by the jury. The court would doubtless have correctly limited or explained the instruction if requested, but no request to that effect was made. We do not regard the instruction as erroneous.

The following instructions were asked by the plaintiff, and refused: "(1) I charge you that 'duress of imprisonment' is unlawful imprisonment, or is compulsion by illegal restraint of liberty; and, if you find that the defendant *Christian* was legally in custody, then there was no duress of imprisonment. (2) That duress of imprisonment is unlawful imprisonment, or is compulsion by illegal restraint of liberty; and that in this case the defendant *Christian* was not illegally restrained of his liberty, but was in custody of the sheriff by due process of law. (3) That if a man is lawfully imprisoned, and to procure his discharge, or on any other fair account, seals a bond or deed, or gives his note, this is not duress. (4) That imprisonment, when lawful, is by no legal intendment an abridgment of the free voluntary volition of the mind in the management of business transactions." The error in the first and second of these proposed

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instructions has already been shown in this opinion, and it is unnecessary to consider it further. The court, in the course of its general charge, told the jury that the fact that the note was executed while *Christian* was under arrest did not render the note void; that the arrest was upon due process of law, and not illegal; and that imprisonment at the time of making a compromise does not itself constitute duress. These instructions fairly cover all that is material and correct in the last two instructions, and therefore there was no error in refusing them.

*By the Court.*— Judgment affirmed.

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WILLEY, Appellant, vs. HODGE and others, Respondents.

*September 7 — September 26, 1899.*

*Equity: Reformation of voluntary conveyance.*

A purely voluntary conveyance of land by a father to an adult son, founded on natural love and affection and made, without any prior consultation or agreement with the grantee, as a testamentary disposition of property, will not, after the death of the grantor and as against his other heirs, be reformed so as to make it describe the land which the grantor intended, but by mistake failed, to convey.

APPEAL from a judgment of the circuit court for Grant county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

On and prior to January 4, 1896, John Willey was the owner of 400 acres of land in the town of Smelser, Grant county, Wis., a homestead in the village of Cuba City, and some real estate in Chicago. He died on January 22, 1896, leaving a widow, five sons, named John A., Samuel, *Thomas*, Henry, and Walter, and four daughters, named *Mary Hodge*, *Martha Terril*, *Nellie Kittoe*, *Grace E. Wills*, and a granddaughter, named *Belle Terril*, who was the only daughter of his deceased daughter Agnes. About January 4, 1896, said



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John Willey, being aged and sick and not expecting long to live, directed Charles Dent, an attorney residing in Cuba City (who died before the trial of this action), to prepare deeds, one to each of his sons, of a designated eighty of said 400 acres of land, and a deed to them jointly of the homestead in Cuba City. The attorney properly drew all of the deeds except the one to the plaintiff, *Thomas*. It was the intention of the father that the land described in his deed to plaintiff should be the E. ½ of the N. W. ¼ of section 35, but through mistake the deed was drawn covering the E. ½ of the N. E. ¼ of the same section, the north forty of which constituted a part of the eighty described in the deed to Samuel, and the south forty was land never owned by him, so that at the time of his death the eighty first above described was not included in any deed signed by him. The deeds so prepared were taken to Willey's house on January 4, 1896, and were duly executed by himself and wife, and witnessed by Dent and one Nicholas Williams. No one else was present. So far as the evidence shows, the deeds were not executed according to any contract or agreement with the sons, and none of them knew of their execution until after his death. On that day, or afterwards, Dent took the deeds to his office, and kept them in his possession until after Mr. Willey died.

On January 28, 1896, Dent took the deeds to the Willey homestead, and in the presence of the five sons delivered them to Mrs. Willey. On February 26, 1896, Mrs. Willey, two of her sons, and Dent went to Galena, Illinois, and deposited the deeds with the cashier of the Galena National Bank, who gave a writing to the effect that he would act as depositary of the deeds, and retain them in his custody until Mrs. Willey's death, and upon due proof thereof would deliver the same to the grantees named. Mrs. Willey died on June 22, 1896. Pursuant to the agreement, the cashier delivered the deeds to the several grantees on June 26, 1896.

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The plaintiff immediately went into possession of the eighty first above described, supposing that this eighty was described in his deed, and has continued in possession thereof. About May 1, 1897, he discovered the mistake. On January 22, 1896, the father, John Willey, executed a will, in which he devised his Chicago property to his daughters and grandchild, the particulars of which devise are not important in this litigation. After the discovery of the mistake in the description in the deed by the plaintiff, his four brothers and *Martha* and *Belle Terril* executed to him quitclaim deeds of their interest in said land. The defendants *Mary Hodge*, *Nellie Kittoe*, and *Grace E. Wills* refused so to do, and claimed an interest in said eighty as heirs of their father. Whereupon the plaintiff brings this action against them for the reformation of said deed. The defendants answer, denying that said deed had ever been delivered.

The court found the facts as herein stated, and, in addition, that the deeds to the several sons were executed upon the consideration of natural love and affection only, and that there was no valuable consideration therefor. The principal question litigated upon the trial was whether there had ever been in fact a legal delivery of said deeds, and in his decision the trial judge said that upon that question his mind wavered and was uncertain. He based his decision upon the fact that the deed in question was a voluntary conveyance, and that the plaintiff had no standing in a court of equity, and could not secure a reformation. Judgment was given for the defendants, from which this appeal is taken by plaintiff.

*T. L. Cleary*, for the appellant, contended, *inter alia*, that courts of equity will interfere to enforce specific performance or to correct errors in voluntary conveyances in three classes of cases: (1) in favor of a wife; (2) in favor of a child; (3) in favor of a charity. 2 Change, Powers, §§ 2817–2930; Pomeroy, Eq. Jur. §§ 588–590; *Randall v. Ghent*, 19

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Ind. 271; *German M. Ins. Co. v. Grim*, 32 Ind. 249; *Winslow v. Winslow*, 52 Ind. 8; *Mason v. Moulden*, 58 Ind. 1; *Owen v. Williams*, 114 Ind. 179. In family settlements equity will interfere to enforce specific performance or to correct errors in favor of the wife or children, and a meritorious consideration is sufficient. Pomeroy, Eq. Jur. §§ 588–590; Adams, Equity, 97, 98; *Buford's Heirs v. McKee*, 1 Dana, 107; *Hayes v. Kershow*, 1 Sandf. Ch. 258; *Edwards v. Jones*, 1 Mylne & C. 226; *Meek v. Kettlewell*, 1 Hare, 464; *Kennedy v. Ware*, 1 Pa. St. 445; *Caldwell v. Williams*, 1 Bail. Eq. 175, 176; *Stone v. Hackett*, 12 Gray, 227; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Magniac v. Thompson*, 7 Pet. 348; *McCall v. McCall*, 3 Day, 402; *Bunn v. Winthrop*, 1 Johns. Ch. 329.

For the respondents there was a brief by *Lowry & Clementson*, and oral argument by *Geo. B. Clementson.*

BARDEEN, J. Following in line with the decision of the court below, the view we have taken of this case renders it unnecessary to determine whether, under the testimony, there has been a legal delivery of the deed under which plaintiff claims. Upon that question we express no opinion.

The deed in question was not made pursuant to any agreement or contract of settlement. It was a purely voluntary conveyance, founded upon natural love and affection, and was made without any prior consultation or agreement with the grantee. A family settlement is an agreement made between a father and his son or children, or between brothers, to dispose of property in a different manner from that which would otherwise take place. 12 Am. & Eng. Ency. of Law (2d ed.), 875; *Baker v. Pyatt*, 108 Ind. 61. It being considered that the transaction in question does not possess the essential elements of a family settlement, it is quite evident that the law regarding such settlements can have no application to this case. It is true, as argued by the appel-

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lant, that equity will sometimes interfere in such cases, and correct errors, and enforce contracts, where the transaction is founded only upon a meritorious consideration. Cases illustrating this principle may be found in the notes, 12 Am. & Eng. Ency. of Law (2d ed.), 877. But in speaking of the disposition of a court of equity to interfere in cases of a voluntary contract, Judge Story says: "It has been said that there are exceptions, and that they stand upon special grounds; such as the interference of courts of equity in favor of settlements upon a wife and children for whom the party is under a natural and moral obligation to provide. But although the doctrine in favor of such exceptions has been maintained by highly respectable authority, yet it must now be deemed entirely overthrown by the weight of more recent adjudications in which it has been declared that the court will not execute a voluntary contract, and that the principle of the court to withhold its assistance from a volunteer applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement." 1 Story, Eq. Jur. § 433. See 2 Story, Eq. Jur. (13th ed.), § 793*b*.

Nor can we apply to this case the same doctrine of equity jurisprudence as is applied to the defective execution of powers. Quoting again from 2 Story, Eq. Jur. § 793*b*: "There may be a clear if not a satisfactory line of distinction drawn between cases of voluntary contracts, covenants, and settlements, where there has been a defective conveyance or execution thereof, and cases of a defective execution of a power. In the latter cases the donee of the power designs to carry into effect, not merely his own objects and interests but those of other persons, by executing the power in favor of persons who stand as volunteers upon a meritorious consideration, and for whom he is under a natural and moral obligation to provide; and his own defective execution of the power, by mistake or otherwise, not only defeats his own positive intention and moral obligation and duty to execute

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the trust reposed in him, but it would, if not aided, also defeat the very objects for which the power was created by third persons, whether it was created as a bounty, or upon a valuable consideration passing between the donor and donee of the power." No such considerations exist in this case, and the freedom of equity intervention in cases of defective execution of powers cannot be invoked to aid the plaintiff in his dilemma. There can be no doubt of the *intention* of the father to convey this tract of land to the plaintiff. His deed, however, fails to describe it. The rule is quite familiar that a defective deed may be treated in equity as an agreement to convey, and performance enforced. But the rule is equally well understood that, when it appears that the deed was voluntary, equity will not carry it into effect or reform it. *Eaton v. Eaton*, 15 Wis. 259; *Hanson v. Michelson*, 19 Wis. 498; *Petesch v. Hambach*, 48 Wis. 443.

It is suggested that, as the deed in question is based upon what is called in the books a "meritorious consideration," the right to a reformation ought to be upheld. All the cases I have been able to find in which such a consideration has been upheld as warranting the intervention of a court of equity rest upon the fact of the defective execution of a power, or upon some matter of contract, such as an agreement for a family settlement, or the result of negotiation and agreement. These elements are entirely wanting in this case. The grantee in the deed knew nothing of its execution until after the father's death. The son was an adult person in no way dependent upon the bounty of the parent. He has no claim upon his father at all, superior to his sisters, against whom he seeks relief. While recognizing the principle that in certain cases the performance of a moral duty will justify the intervention of equity, Pomeroy, in his work on Equity Jurisprudence, says that it is only effective within very narrow limits, and will only "enforce the promise thus imperfectly performed, as against a third person claiming

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merely by operation of law, who has no equally meritorious foundation for his claim." Sec. 588. No case has been found that carries the rule to the limit sought in this case. On the contrary, modern decisions are the other way. Story, Eq. Jur. § 987, repeats the doctrine before quoted, and says the court will not interfere, although the parties stand in the relation of wife or child. A recent case in Michigan, cited by the trial court, fully sustains his conclusions. *Shears v. Westover*, 110 Mich. 505.

The transaction under consideration was, in a general sense, a testamentary disposition of property. The doctrine being established in this state that equity will not reform a will, the plaintiff is left without remedy. *Sherwood v. Sherwood*, 45 Wis. 357.

*By the Court.*— Judgment of the circuit court is affirmed.

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## EVANS, Administrator, Appellant, vs. KEMP, Respondent.

*September 7 — September 26, 1899.*

*Wills: Construction: Life estate: Judgment: Appeal: Costs.*

1. A will, after giving to testator's wife "all my estate, both real and personal, during her natural life," proceeded: "I also devise and bequeath to her all rents, interest on money, and profits that may accumulate from any source, to be used by her for her special benefit during her natural life." The donation to the remaindermen was confined to "my estate." *Held*, that the gift of an absolute life estate in all the property was not curtailed by the subsequent provision, and that all accumulations of the income of the estate became the separate property of the widow.
2. Where, in an action at law against an executor, plaintiff has judgment not only for all the property which he is entitled to recover in such an action but also for further relief as to other property for which the testator's estate would have been liable in some other form of procedure, such judgment will not be reversed for that reason on an appeal by the plaintiff.

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3. Where in an action at law plaintiff recovers judgment responsive to his complaint, though not to the full extent of his claim, the fact that the court includes in the judgment some further relief, equitable in its character, cannot deprive him of his statutory right to costs.

APPEAL from a judgment of the circuit court for Grant county: GEO. CLEMENTSON, Circuit Judge. *Modified and affirmed.*

Joseph Kemp died testate in 1877, leaving, according to the inventory of his estate, securities to the extent of $4,100; live stock, farm implements, and crops to the extent of $429; wearing apparel, ornaments, and household furniture to the extent of $210. By his will he made his widow, Sarah Kemp, his executrix, to which place she duly qualified; and he further bequeathed, after the payment of debts: "To my beloved wife, Sarah Kemp, all my estate, both real and personal, during her natural life. I also devise and bequeath to her all rents, interest on money, and profits that may accumulate from any source, to be used by her for her especial benefit during her natural life." After her death he devised to the defendant, *Joseph J. Kemp*, all real estate and personal chattels, and $800 in money, and divided the residue of his estate equally between his other son, John W. Kemp, and his daughter, Mary Jane Barron.

The widow went into possession of all the property, inclusive of the eighty-acre farm, in which it appears, somewhat indefinitely, that she had a half interest in her own right. She filed her inventory, but never settled the estate. She continued to live upon the farm and used the personal property until her death, which occurred about 1896,—nineteen years later. During the first four years of this period the defendant, *Joseph J. Kemp*, being a minor, worked on the farm for her. After his majority, about 1881, she leased the farm to him without rent, except her own residence and maintenance thereon, and the keep of any stock she might

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have, and payment of taxes. All of the chattels derived from her husband she used up by ordinary use before her death, and all of the securities she had collected, except a single note and mortgage for $1,000, made by John Bennett, on which the interest had been paid regularly up to the time of her decease. She left a will appointing her son *Joseph J.* executor, and dividing her property among her three children and their children in proportions differing from those specified in her deceased husband's will. *Joseph J. Kemp* qualified as her executor, and took possession of all property in her possession at the time of her death, including said Bennett note and mortgage.

The plaintiff, having been appointed administrator *de bonis non* of the estate of Joseph Kemp, deceased, brought an action in detinue against the defendant, demanding recovery of all the personal property coming to his possession from his mother, describing it as in the inventory which he had filed as executor; the contention being that all of such personal property was proceeds and accumulation of the property left to Sarah Kemp, and reverted to the estate of Joseph Kemp upon her decease.

The circuit court held that the will conveyed to her a life estate in all the property of her husband; that the property left by her at her decease, while largely proceeds and accumulation of the property so received by her, also included accumulations from property which belonged to her independently, but that all accumulations of income became her separate property and did not belong to the estate of Joseph Kemp. The court further held that the Bennett note did revert, and also that her estate would be liable to his estate for the balance of the principal of the securities received by her, namely, $3,100, and rendered judgment that plaintiff recover the Bennett note and enough other property to make up the sum of $4,100, with interest at the rate of six per cent. from the date of the death of Sarah Kemp, without

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costs to either party. From this judgment the plaintiff appeals, and the defendant does not.

*T. L. Cleary*, for the appellant.

For the respondent there was a brief by *Lowry & Clementson* and *W. J. Brennan*, and oral argument by *Geo. B. Clementson.*

DODGE, J. The appellant contends that he was entitled to recover all of the personal property left by the deceased, Sarah Kemp, for the reason that by her husband's will she was given only the right to support out of the income of his property, and that all accumulations thereof must revert at the time of her death, and that the property which she had at the time of her decease had been acquired with the proceeds and accumulations of property left by him. This being an action for specific articles, and not for an accounting or to charge the estate of the deceased with misconduct by her as a trustee or an executor, it might well be disposed of upon failure of proof that any specific article, always excepting the Bennett note, had been acquired exclusively with moneys of her husband's estate, income of her own having been mingled therewith. *Bromley v. C., C., C. & St. L. R. Co.* 103 Wis. 562; *Nonotuck S. Co. v. Flanders*, 87 Wis. 237; *Burnham v. Barth*, 89 Wis. 362.

But, independently of this ground, we have no doubt that the construction given to the will by the circuit court was the correct one. It is apparent from the intrinsic evidence that the will was prepared by an illiterate person. It, in terms, first gives an absolute life estate in all property, and the additional language used does not evince any purpose to curtail this gift, but, rather, to add to it. We think it apparent that the thought in the mind of the testator was simply to amplify the giving of the actual personal property by declaring that he intended, also, the enjoyment of the income thereof. A purpose such as the appellant con-

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tends for — of providing for the widow's support, and retaining to his estate whatever was not needed therefor — would almost inevitably have involved authority to the widow to use of the principal as well as of the income; but, clearly, no such grant is made by the will, and we think no such scheme was in his mind. Again, if the testator had actually in contemplation the accumulation of a fund from the income to enhance and increase his estate, it is hardly conceivable that such purpose should not have been evinced in the donation to the remaindermen, which, however, is confined to "my estate." We think this expression, which is the same used to describe what is given for life to the widow, would not have been used had he meant them to share not only in the estate which he left at his death but in any accumulations of income thereof which might arise in the hands of his widow. We draw that inference partly from the evidences of inaccurate and uncertain understanding of the meaning of terms apparent throughout the will, and feel sure that neither the testator nor the scrivener would have felt safe to rely on the expression "my estate" to indicate what might thereafter be accumulated by the widow.

From this conclusion it necessarily results that none of the specific assets coming to the defendant from his testatrix, and described in the complaint, except the John Bennett security, belonged specifically to the estate of Joseph Kemp, deceased. None of them had had existence during his lifetime, and none of them came to the widow from him. The plaintiff could not properly, therefore, recover in this action anything but the Bennett note and mortgage. It is, however, undoubtedly true that the estate of Sarah Kemp would have been liable for the principal of the $3,100 worth of securities collected by her, in some form of procedure; and, as the defendant raises no objection to the fact that recovery therefor is allowed in this suit, the judgment need

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not be reversed for that reason. Inasmuch as the plaintiff was entitled to recover nothing but the Bennett note, the judgment, so far as it gives him anything else, is in excess of his rights, and not prejudicial to him, and therefore cannot be successfully assailed by him. *Waterhouse v. Freeman*, 13 Wis. 339; *Smith v. Hoyt*, 14 Wis. 252; *Dousman v. Wis. & L. S. M. & S. Co.* 40 Wis. 418.

On the question of costs, however, the judgment is erroneous. Plaintiff, in an action at law, recovered judgment responsive to his complaint, to the amount of $1,000. His right to costs is conferred by statute (sec. 2918, Stats. 1898), and the court had no discretion on the subject. The fact that the court included in the judgment some further relief as to other property, perhaps equitable in its character, cannot deprive plaintiff of his statutory rights. The judgment should be modified so as to award plaintiff costs, to be taxed under the statute. In this court appellant will recover as costs only fees of the clerk of this court, and $25 for printing.

*By the Court.*—Judgment modified so as to award plaintiff taxable costs in circuit court, and, as so modified, it is affirmed.

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CONSOLIDATED MILLING COMPANY, Appellant, vs. FOGO and others, Respondents.

*September 8—September 26, 1899.*

*Debtor and creditor: Purchase of goods by insolvent: Fraudulent conveyances: Rescission: Declarations by agent.*

1. A purchaser of goods knew or had reason to believe that he was insolvent but, not being asked in respect thereto, did not disclose the fact to the vendor. After receiving the goods, and on the same day that he finished placing them in his store building, he gave chattel mortgages thereof to a bank and others. At the time he

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gave the order he intended to pay for the goods, and he had no thought of giving the mortgages until the goods were in the store and suit had been threatened by another creditor. *Held*, that the sale was complete, without fraud, before the giving of the mortgages, and that the vendor could not rescind it and retake the goods.

2. Statements made to the vendor's agent by the assistant cashier of the mortgagee bank, before the sale, as to the financial standing of the purchaser, which influenced the vendor to fill the order, are *held* not binding on the bank, having been made in a casual conversation and not in the transaction of any business between the bank and such agent.

APPEAL from a judgment of the circuit court for Richland county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

*L. H. Bancroft*, for the appellant.

For the respondents there was a brief by *Frank W. Burnham* and *Fruit & Gordon*, and oral argument by *Mr. Burnham* and *Mr. J. J. Fruit.*

CASSODAY, C. J. It appears from the record that April 9, 1898, the plaintiff, a milling corporation of Minneapolis, commenced this action of replevin to recover 500 sacks of flour, of the value of $625, which had been ordered by the defendant *W. F. J. Fogo*, a merchant and dealer in flour at Richland Center, March 28, 1898, and which was received by *Fogo* at his store on April 5, and in the forenoon of April 6, 1898, and which on the afternoon of the same day he mortgaged, with other property, to the defendant the *State Bank of Richland Center*, for $4,969.13, and to the seven other defendants in the aggregate amount of $7,483.64, on the ground that *Fogo* purchased the same knowing himself to be insolvent and with the preconceived purpose of not paying for the same. The defendants severally and separately answered.

A jury having been waived and trial had, the court found, as matters of fact, in effect, that October 26, 1897, *Fogo* ordered of the plaintiff three car loads of flour, to be received

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within thirty, sixty, and ninety days, respectively; that one of such car loads was received by him in January, 1898, and paid for prior to March 28, 1898; that the other car loads were not furnished, as the plaintiff, for good reason, decided to cancel the order; that March 28, 1898, *Fogo* directed the plaintiff to forward to him another car load of flour; that he received the same April 5, 1898; that on that day and the forenoon of the following day he took the flour from the car and placed it in his store building; that such flour was the same as was replevied by the plaintiff; that March 28, 1898, and for some time prior thereto, *Fogo* was insolvent; that upon that day his total indebtedness, including liabilities for others, amounted to $12,000, and his total assets did not exceed $9,000; that upon March 28, 1898, he had good reason to believe that he was insolvent, but that at the time he gave the order for the flour he intended to pay for it, and did not contemplate giving the chattel mortgages in evidence or making an assignment; that the plaintiff would not have filled *Fogo's* order of March 28, 1898, but for the fact that the plaintiff's agent, Anderson, had been informed at Platteville by Clark Pease, the assistant cashier of the defendant bank, that *Fogo's* financial standing was all right; that Pease was not at that time aware that *Fogo* was about to make a further purchase of flour, but had reason to believe that what he said would probably influence the action of the plaintiff in its further dealings with *Fogo;* that such conversation took place March 23, 1898; that the plaintiff was induced to fill *Fogo's* order of March 28, 1898, for another car load of flour, by the representations made to Anderson by Pease as to *Fogo's* financial standing, and that such flour would not have been shipped but for such statement; that January 19, 1898, the defendant bank had received, as grantee of *Fogo*, a deed of his store building, worth $5,000, to secure a note which *Fogo* had signed with his brother for $1,000, and also to secure the general in-

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debtedness of *Fogo* to the bank; that such deed was not recorded until March 26, 1898, for the obvious reason that the bank did not wish to impair *Fogo's* credit, and so withheld the deed from record as long as it safely could, and only recorded the same when its own safety so required; that the value of the flour was $625; that there was no cause of action against any of the defendants except *Fogo.*

And, as conclusions of law, the court found, in effect, that the plaintiff was not entitled to the possession of the property or any part thereof, nor to a return or delivery thereof, nor to recover the value of the same or any part thereof; that *Fogo* was entitled to a return of such property, or, in case a return could not be had, that *Fogo* have judgment for the value thereof, to wit, $625, together with interest from April 8, 1898, and six cents damages for the taking and withholding of the property; that as the property had been delivered to the plaintiff, and a return thereof had been claimed by *Fogo*, it was ordered that judgment be entered against the plaintiff dismissing this action upon the merits as to all the defendants except *W. F. J. Fogo;* that judgment be entered against the plaintiff for a return of the flour, and, in case a return cannot be had, for $625 damages, being the value thereof; that the defendants and all of them have their costs in this action against the plaintiff, to be taxed. From the judgment entered thereon accordingly the plaintiff appeals.

It is undisputed that *Fogo* got the flour all into his store before noon of April 6, 1898, and that upon the afternoon of that day he gave the chattel mortgage thereon to the defendant bank, and the other chattel mortgages thereon to the other defendants. The pledging of this property to other favorite creditors, almost immediately upon getting possession of it, naturally excites suspicion as to the good faith of the transaction. But the trial judge, who was in a much better position to determine that question than we

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are, has found that at the time of ordering the flour *Fogo* intended to pay for it, and that at that time he did not contemplate the giving of the chattel mortgages, nor the making of an assignment for the benefit of his creditors, as he did immediately after this suit was commenced, April 9, 1898. What occurred after giving the order for the flour, March 28, 1898, to induce him to give the chattel mortgages? He testified to the effect that during the months of February and March, 1898, he had paid bills in the aggregate to the amount of $601.25; that April 6, 1898, one Jenkins, who represented the Hubbard Milling Company, having a claim against him for a car load of flour which had become due a day or two before, appeared at his store and demanded payment; that, when he informed Jenkins that he was not then able to pay, Jenkins insisted that he must either pay or give security, and, when he refused to do so, Jenkins told him that he would resort to legal proceedings; that, shortly after, Pease, representing the defendant bank, came to him and said the bank did not feel safely secured for his indebtedness to the bank, and requested him (*Fogo*) to give a chattel mortgage to the bank, and that, after some talk with Pease, he consented, and gave the mortgage mentioned, and the same was filed at half past 1 o'clock of April 6, 1898; that immediately after the giving of that mortgage the other mortgages mentioned were given and filed; that on the evening of the same day the Hubbard Milling Company commenced an action against him and attached his property; and that he did not contemplate the making of an assignment for the benefit of creditors until a couple of days after the giving of the chattel mortgages, and then only after he had taken legal advice. Such evidence appears to be undisputed. If true, it establishes the facts that *Fogo* not only intended to pay for the flour when he ordered the same of the plaintiff, but that he had no thought of giving a chattel mortgage thereon until after the flour was in his store and

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he was threatened with legal proceedings and an attachment by the Hubbard Milling Company. The trial court having based some of the material findings upon the sole testimony of *W. F. J. Fogo*, we do not feel at liberty to disregard his evidence as to the facts stated.

It is conceded that where a person orders goods, knowing himself to be insolvent, without disclosing his insolvency, and with the preconceived purpose of not paying for them, the purchase is fraudulent, and the vendor, upon discovering the fraud, may rescind the contract and retake the goods, as against the vendee and those having no better right to them. *Lee v. Simmons*, 65 Wis. 526; *David Adler & Sons C. Co. v. Thorp*, 102 Wis. 70, and cases there cited. But it is equally true that the mere omission of a purchaser of goods to disclose his known insolvency to the vendor is not a fraud for which the sale may be avoided. Such mere silence in respect to his pecuniary condition, when no inquiries have been made, is not evidence of fraud. An honest, though abortive, purpose to continue business and pay for the goods is consistent with the vendee's knowledge of his own insolvency. *Id.* We must hold that the sale of the flour to *Fogo* was complete and without any fraud before the giving of either of the mortgages.

It may be that the plaintiff would not have shipped the flour but for the representations made to Anderson by Pease at Platteville, but Pease was not *Fogo's* representative and had no authority to speak for him. It was a mere casual conversation. The defendant bank had no business with Anderson at the time. Pease was not transacting any business for the bank at the time of making the declarations attributed to him. Since he was not, at the time of making such declarations, acting within the scope of his authority as assistant cashier of the bank, it is obvious that he could not bind the bank by such declarations. *Randall v. N. W. Tel. Co.* 54 Wis. 140–144, and cases there cited; *Ram-*



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*sey v. Holmes E. P. Co.* 85 Wis. 174, 186; Mechem, Agency, § 714. As to when admissions of such officer or agent are binding, see *Xenia Bank v. Stewart*, 114 U. S. 228, 229.

*By the Court.*— The judgment of the circuit court is affirmed.

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BALDWIN, Appellant, vs. FOGO and others, Respondents.

*September 8 — September 26, 1899.*

*Consolidated Milling Co. v. Fogo, ante*, p. 92, followed.

APPEAL from a judgment of the circuit court for Richland county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

*L. H. Bancroft*, for the appellant.

For the respondents there was a brief by *Frank W. Burnham* and *Fruit & Gordon*, and oral argument by *Mr. Burnham* and *Mr. J. J. Fruit.*

CASSODAY, C. J. The findings of fact, and the conclusions of law, and the judgment in this case are substantially the same as in the case of *Consolidated Milling Co. v. Fogo, ante*, p. 92; and for the reasons given in that case the decision of this case is in favor of the defendants.

*By the Court.*— The judgment of the circuit court is affirmed.

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HABERMAN, Respondent, vs. GASSER, Appellant.

*September 8 — September 26, 1899.*

*Husband and wife: Agency: Election between remedies: Sale of diseased meat: Instructions to jury: Exemplary damages.*

1. In purchasing family supplies a wife acts as agent of her husband, and her election to rescind a contract for the purchase of meat and receive back the consideration because the meat was bad does not affect her right to damages in a tort action for her sickness caused by eating some of the meat.

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2. In an action for the injury caused by eating diseased meat sold by defendant to plaintiff, a charge that it was an offense, under the statute, knowingly to sell unwholesome meat, is criticised but *held* not a material error, the court not having been requested to call the jury's attention to the fact that the action was not a criminal one, and the verdict not giving evidence of the influence of passion or prejudice.
3. In an action in which the question whether exemplary damages ought to be awarded was one for the jury under proper instructions, a charge stating, among other things, that it was the privilege of the jury "in this case" to award such damages,— from which the jury must have understood that, as matter of law, the particular case was one calling for the imposition of exemplary damages in their discretion,— is *held* erroneous.
4. A refusal to give instructions requested is not error, even if they were correct, where they were substantially covered by the general charge.

APPEAL from a judgment of the circuit court for Richland county: GEO. CLEMENTSON, Circuit Judge. *Reversed.*

This is an action in tort to recover damages for sickness alleged to have been caused by eating diseased meat sold to the plaintiff by the defendant. The answer admits the sale of the meat, alleges settlement of the plaintiff's right of action, and charges that any sickness which the plaintiff may have had was caused solely by her own negligence, and denies all the other allegations of the complaint.

The action was tried before a jury. The plaintiff's evidence showed that in February, 1898, she was the wife of one Anton Haberman, and that they had six children, and that she purchased a quarter of beef, weighing about 100 pounds, from the defendant, *Gasser;* that they used the meat for two or three weeks, and that she and some others of the family became sick; that the defendant came to the house at her request, and when she told him of the sickness he took back the remaining portion of the meat, and returned to her $5, which was the purchase price of the meat, and also paid her $5 for her husband's loss of time, but that the defendant paid her nothing personally for her own sickness

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and loss of time; that the meat was paid for out of money which she and her husband accumulated together, she herself being the proprietor of a cigar factory. The defendant, by his evidence, admitted the sale of the meat, and that he took back the remainder of it, and that he gave the plaintiff back the consideration, and that the $5 paid by him for loss of time was for the loss of time of both husband and wife. There was expert testimony on both sides; that of the plaintiff tending to show that the meat was diseased and in fact caused the sickness of the plaintiff and her family, while that of the defendant tended to show that the meat was wholesome and could not have caused the sickness. There was also other testimony on behalf of the defendant tending to show that other persons had eaten of the same meat and had suffered no injury.

The jury returned a verdict for the plaintiff, fixing compensatory damages at $25 and exemplary damages at $175, upon which verdict judgment for the plaintiff was rendered for $200, and the defendant appeals.

For the appellant there was a brief by *Jones & Stevens*, and oral argument by *E. Ray Stevens*.

For the respondent the cause was submitted on the brief of *Herman Grotophorst*.

WINSLOW, J. A motion for nonsuit was made in this case on the ground that the evidence showed that the plaintiff had elected to rescind the contract for the purchase of the meat and receive back the consideration paid, and had thereby waived any other remedy. This motion was properly overruled, for a plain reason. If any contract was rescinded, it was a contract with the husband. The plaintiff, in purchasing family supplies, was acting as agent of her husband; and hence any contract made by her was in legal effect her husband's contract, and the rescission thereof could not affect her right to damages in a tort action.

The remaining exceptions relate to the charge of the court.

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The defendant requested the following instructions, which were refused: "(1) This is a civil action brought to recover damages for an alleged injury which the plaintiff claims to have suffered on account of eating diseased and unwholesome meat purchased from the defendant. (2) The gist of the action is the selling of the diseased or unwholesome meat as good and wholesome, and the injury resulting from the eating of the same." These instructions were appropriate statements, and it would have been error to refuse them had they not been covered by the general charge; but examination of the charge shows that they were substantially covered thereby, and hence it was not error to refuse them.

The court charged that it was an offense, under the statutes, for a person to sell unwholesome meat, knowing, or having good reason to believe, it to be unwholesome. Stats. 1898, sec. 4607*g*. This was a correct statement of the law, but it is claimed that it was erroneous, because no such question was involved in this action, and that it was prejudicial, because tending to put the defendant in the attitude of a criminal. There is certainly force in the argument, and we should have been better pleased had the instruction not been given. However, we cannot regard it as distinctly prejudicial. Doubtless the court would have called attention to the fact that the present action was not a criminal action, had a request to that effect been made. If the verdict gave evidence of the influence of passion or prejudice, the question would become a serious one.

Certain instructions as to the burden of proof and the preponderance of the evidence were asked by the plaintiff and refused. As they were, in substance, covered by the general charge, however, it becomes unnecessary to state them at length.

We think, however, that there was error committed in that part of the charge as to exemplary damages, which necessitates reversal of the judgment. The court charged

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that it was the privilege of the jury, *in this case*, to award to the plaintiff exemplary damages, and then defined exemplary damages as being damages by way of punishment or example, which, in *a certain class of cases, within which this case comes*, the jury may award to the plaintiff, in their discretion, in addition to compensatory damages. By this instruction the jury must have understood that the court had decided, as matter of law, that this particular case was one calling for the imposition of exemplary damages in their discretion. It is entirely clear that the question whether exemplary damages ought to be awarded at all in this case was one for the jury, under proper instructions. The jury should have been told the conditions under which they would be authorized to give exemplary damages, namely, that such damages were only to be awarded in case the act complained of was malicious or vindictive, or evinced such gross or criminal negligence and disregard of the rights of others as in law was equivalent to malice. *Pickett v. Crook*, 20 Wis. 358.

*By the Court.*— Judgment reversed, and action remanded for a new trial, with the option to the plaintiff to remit the amount of exemplary damages awarded at any time within thirty days after the record is remitted to the trial court, in which case judgment is to be entered for the plaintiff for the compensatory damages awarded by the verdict.

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LEEDOM and others, Respondents, vs. THE H. B. CLAFLIN COMPANY, Garnishee, Appellant.

*September 9—September 26, 1899.*

*Debtor and creditor: Chattel mortgage: Voluntary assignment.*

Insolvent debtors gave a chattel mortgage covering substantially all their property to their largest creditor for himself and as agent and trustee for four other creditors. The mortgagee took imme-

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diate possession and proceeded to sell the property and distribute the net proceeds *pro rata* among the creditors so preferred, all of whom knew that the debtors were insolvent at the time the mortgage was given. *Held*, that the transaction amounted to an assignment for the benefit of creditors, in violation of the statute (sec. 1694, Stats. 1898), and that the mortgage was fraudulent and void as to the other creditors.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Affirmed.*

The plaintiffs brought this action against the defendants, as copartners under the firm name of the White House Dry Goods Company, to recover the amount of a promissory note. The *H. B. Claflin Company* was summoned as garnishee, and made answer denying liability. The action was tried by the court without a jury, findings were made in favor of the plaintiffs, and judgment entered against the garnishee, from which judgment the garnishee takes this appeal.

For the appellant there was a brief by *Bleekman, Bloomingdale & Bergh*, and oral argument by *A. E. Bleekman.*

For the respondents there was a brief by *Fruit & Gordon*, and oral argument by *G. H. Gordon.*

BARDEEN, J. The objections to this judgment are based entirely upon the court's findings. It is earnestly insisted that the findings are opposed to, and are not supported by, the evidence. The facts, briefly stated, are as follows:

The defendants were conducting a large dry goods store at La Crosse. They were indebted to some ninety different creditors in the sum of over $29,000, about $16,000 of which they owed to the garnishee. Quite a large portion of their indebtedness was due, and they were being pressed for payment. On January 16, 1897, garnishee's agent, George M. Shelley, came to La Crosse and demanded a settlement or security. The defendants objected, but after some persua-

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sion a chattel mortgage was given, which the court finds covered all of their property except some book accounts and a piece of real estate held under contract, which were of little or no value. The mortgage was for $19,169.01, which covered the garnishee's claim of $15,797.60, and the claims of four other creditors, amounting to $2,183.98. The difference of $1,187.43 is claimed to have been for money advanced to defendants to pay help and certain small debts owed around town. The garnishee's agent took immediate possession of the stock, sold at retail for about sixty days, and then made a sale of the remainder in bulk to one O'Brien, who in turn sold to Gregory in September following. The garnishee claims to have realized only $17,527.11 from a stock alleged to have inventoried some $48,000.

The court found that the mortgage was given to the garnishee for itself, and as agent and trustee for the four other creditors named; that the mortgage covered substantially all of defendants' property; that, after deducting the expense of sale, the garnishee distributed the balance of the proceeds among the five creditors preferred, except the sum of $489.40, which sum had not yet been distributed; that each creditor received forty-eight per cent. of its claim, in two dividends of twenty-five and twenty-three per cent.; that at the time the mortgage was given the defendants were insolvent, which fact was known to the parties interested; and that the mortgage was fraudulent and void as to creditors.

As might be expected, the garnishee attacks these findings with great vigor. The point especially urged with vehemence is that the court had no warrant to find that the garnishee took possession of the goods as agent and trustee for the other creditors. To get over the court's conclusion, the garnishee claims that it purchased the claims of these several creditors outright before the mortgage was given. There is considerable evidence to support this conclusion,

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coming principally from J. C. Lance, who was the husband of the defendant M. J. Lance, and her agent in charge, and Shelley, who was the garnishee's representative at the time the mortgage was taken. Shelley says that all of these creditors except one were paid in cash by him at the time of the purchase; that, as to the other creditor, he agreed to pay the claim on behalf of the garnishee; and that he had assignments of the accounts. In this he is contradicted by several of the creditors. But the most complete impeachment of this claim is furnished by the garnishee's letters and account. In letter of April 7, 1897, to the Mons Anderson Company, one of the preferred creditors, the garnishee writes: "We have received from the sales of the White House Dry Goods Co. of La Crosse, Wis., $4,100. This will not quite pay twenty-five per cent., including our claim; but we feel you are entitled to your division, and we therefore inclose herewith our check for $68.85." In another letter, of March 15, 1898, they send the same company a check for $63.34, being a *pro rata* dividend of twenty-three per cent. on their claim, with a statement showing receipts and disbursements under the mortgage. This statement is quite instructive on this branch of the case. It shows receipts from sales up to the sale to Gregory in September, and while the stock was said to have been in the hands of a stranger, and *pro rata* payments upon all of the claims of the preferred creditors, except one, which they paid after an attachment had been levied. These facts, together with others which might be mentioned, completely impeach the alleged claim of purchase of these accounts.

A careful review of the evidence has served to convince us that the other exceptions to the findings stand on quite as precarious a foundation. We need only to invoke the often reiterated and salutary rule that this court will not disturb the findings of the trial court unless we can see a preponderance of evidence against them. This rule has been stated

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so many times that authorities need not be cited for its support. In this case we are well satisfied that the findings are supported by the evidence, and that the conclusions of the trial court were manifestly right. The taking of this mortgage and the treatment of the mortgaged property operated as a fraud upon the plaintiff's rights, and the court was justified in holding that the circumstances brought the case within the line of decisions noted in *Strong v. Kalk*, 91 Wis. 29.

*By the Court.*— The judgment of the circuit court is affirmed.

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HOGAN, Respondent, vs. CITY OF LA CROSSE and another, Appellants.

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*September 9 — September 26, 1899.*

*Appeal: Dismissal: Correction of error below.*

Where the entire error upon which an appeal is based was corrected, or the appellants' entire ground of complaint removed, by the action either of the adverse party or of the trial court, before the appeal was perfected,— in this case by the filing of the respondent's consent that the judgment in his favor should be vacated and judgment be entered dismissing his complaint or affirming the validity of the special assessment attacked therein, with costs,— the appeal should be dismissed upon the fact being made to appear.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Appeal dismissed.*

This was a suit in equity to cancel and enjoin enforcement of special assessment certificates for the building of sewers in the city of *La Crosse*, under the same proceeding which was involved in the recent case of *State ex rel. Schintgen v. La Crosse*, 101 Wis. 208. Judgment was rendered in accordance with the prayer of the complaint, holding the

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special assessments void. After the decision in the *Schintgen Case*, and before any appeal from the judgment had been perfected, the plaintiff and respondent served upon the defendants' attorneys, and filed with the clerk of the court, a consent that that judgment be vacated and set aside, and that judgment be entered dismissing the complaint or affirming and holding valid the proceedings set forth in the complaint and the tax and special assessments based thereon, with costs in the usual manner. Notwithstanding this tender or consent, the defendants perfected their appeal to this court. A motion is now made to dismiss, on the ground that no controversy exists.

For the appellants there was a brief by *Ray S. Reid*, *Martin Bergh*, and *W. F. Wolfe*, city attorney, and oral argument by *Mr. Reid.*

For the respondent there was a brief by *Higbee & Bunge* and *McConnell & Schweizer*, and oral argument by *E. C. Higbee.*

DODGE, J. It is a fundamental principle at the foundation of our judiciary system that courts sit only to decide actual controversies, and not to answer moot questions of law or fact, nor to declare abstract principles or rules of law not applicable to issues or controversies actually before them. 2 Ency. of Pl. & Pr. 342 *et seq.*; *Little v. Bowers*, 134 U. S. 547; *Washington Market Co. v. District of Columbia*, 137 U. S. 62; *Singer Mfg. Co. v. Wright*, 141 U. S. 696; *California v. S. P. & T. R. Co.* 149 U. S. 308; *Mills v. Green*, 159 U. S. 651; *Plainfield v. Plainfield*, 67 Wis. 525. No less thoroughly established is it that the appellate jurisdiction of this court cannot be successfully invoked unless rights of the appellant are substantially prejudiced by the act appealed from. *Benson v. Waukesha*, 74 Wis. 31; *White v. Sherry*, 37 Wis. 225; *McGregor v. Pearson*, 51 Wis. 122.

Further, it has often been held in Wisconsin that an error

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in the court below will receive no attention on appeal where it has been corrected by the voluntary act of the favored party before the appeal was perfected. *Duffy v. Hickey*, 68 Wis. 380; *Reinig v. Hartman*, 69 Wis. 28; *Littlejohn v. Turner*, 73 Wis. 113; *German M. F. F. Ins. Co. v. Decker*, 74 Wis. 556.

The question of practice whether, if the entire error upon which the appeal is based has been corrected, the appeal should be dismissed, or the act of the court below be affirmed, seems not to have been expressly passed on in Wisconsin, for the reason probably that in all cases where such a correction has been presented other issues were also brought up by the appeal. The practice of dismissal, where the entire controversy has been disposed of by the elimination of the error below, is, however, approved repeatedly by the supreme court of the United States, and was the practice followed in all of the cases cited from that court. We see no reason why that practice should not be pursued. A party whose entire ground of complaint has been removed by action of either the adverse party or the court below has no justification for appealing to this court, and, if he does so, should be at once dismissed, upon the fact being made fully to appear. That is shown here. The consent of the plaintiff on file in the circuit court for La Crosse county would have accorded to the defendant all the relief which could result from the filing of a *remittitur* from this court reversing the judgment below and ordering dismissal of the complaint, and, upon the dismissal of this appeal, that relief is still at its disposal.

*By the Court.*— Appeal dismissed.

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BIGELOW, Respondent, vs. CHICAGO, BURLINGTON & NORTHERN RAILWAY COMPANY, Appellant.

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*September 9 — September 26, 1899.*

*Railroads: Carriers:* Ultra vires: *Contract for carriage between points not on line: Consideration: Breach: Measure of damages.*

1. Whether a contract by a railway corporation to transport merchandise between two points, neither of which is on its own line — over which, however, most of the carriage is to be — is *ultra vires*, not decided.
2. In an action for the breach of such a contract, brought against the railway company by one whom the company, by making the contract, had induced to buy the merchandise to be transported, the company cannot invoke the doctrine of *ultra vires* as a defense.
3. The evidence in this case — showing, among other things, that the freight agent of the defendant railway company at a certain city, as also his predecessors, had always represented the company in its dealings with freighters on the tracks of other roads and also with reference to certain establishments outside the city limits, and tending to show, by certain correspondence between the general freight agent and the local agent as to the transaction in question, the understanding of both that such dealings were within the province and duty of the latter — is *held* to support the conclusion of the jury that the local agent had actual authority to contract for the carriage of certain freight situated outside the city limits and not on defendant's tracks.
4. Where the defendant railway company, in order to induce plaintiff to buy certain ice, promised to transport it for him at certain rates from the place on another line where it then was, and on the faith of such promise he bought the ice, there is a sufficient consideration for the contract of carriage.
5. A notification of the plaintiff by the company, in such case, that it could not furnish him cars and take the ice from where it was, sufficiently shows a breach of the contract, and repeated demands by plaintiff were unnecessary.
6. After plaintiff had been so induced to buy the ice, he sold it to one who agreed to purchase at an advanced price and pay the freight provided the ice could be transported according to defendant's promise; and, but for defendant's breach of such promise, plaintiff would have received such advanced price. *Held*, that the measure

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of damages for such breach of contract was said price, less the expenses of shipping the ice, and less, also, such sum as might have been obtained for it upon sale to other parties, together with interest from the commencement of the action; but it appearing that, though unable to sell to others, plaintiff might, by incurring additional expense — far less than the damage otherwise to result — have availed himself of the sale mentioned, and that he made no effort in that behalf, but allowed the ice to melt, he cannot recover for so much of the loss as he might, by reasonable diligence, have avoided.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

In the summer of 1896 plaintiff was, and for some years had been, a dealer in ice at La Crosse, with customers to the southward, mainly on the line of the defendant's railroad and connections. Plaintiff claims that about the 1st of August the defendant's station and freight agent at La Crosse came to him, and called his attention to a quantity of ice stored at the abattoir just outside the city limits, which was for sale, and urged him to purchase it. The abattoir was located on a track of the Chicago, Milwaukee & St. Paul Railway Company. Plaintiff responded that he could not use it, as he could not reach his customers over the Chicago, Milwaukee & St. Paul Railway. The agent thereupon assured him that the defendant could and would furnish him cars at the abattoir promptly, take his ice, and ship it to southern points at the regular rates, and especially to Springfield, Illinois, which was a principal shipping point for him, at the rate of $2 per ton, free of the expenses of getting the cars to and from the abattoir, and assured him that the defendant would give him prompt shipments. The plaintiff, relying on these assurances, purchased the ice, amounting to 778 tons, at the price of seventy-five cents per ton. Shortly after, a customer of his from Springfield came to La Crosse, examined the ice, and agreed to buy about 600 tons of it, to be shipped from time to time to him at Springfield, provided

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it could be shipped over the defendant's line at a rate of $2 per ton. Thereupon the plaintiff and the proposed customer called on the defendant's agent, who assured them they could depend on the defendant company taking and shipping the ice at the rate mentioned with promptness and in satisfactory cars. Thereupon the Springfield man agreed to purchase the ice delivered on board cars at the abattoir for $2 per ton, provided shipments could be had as promised; he to pay the freight.

Plaintiff shipped one car of the ice to another customer, and one car to the Springfield customer, whereupon the Chicago, Milwaukee & St. Paul Railway refused to switch the defendant's cars to and from the abattoir; claiming it was not within the agreement between railroads for switching charges. The defendant's agent and its general freight agent attempted to negotiate arrangements with the Chicago, Milwaukee & St. Paul Railway, but did not succeed in reaching terms with them, and thereupon failed and neglected to supply plaintiff with cars as requested for the shipment of the ice, and notified them that they were unable to do so. Plaintiff made exertions to sell the ice to other parties unsuccessfully, with the result that it melted in the warehouse and was a total loss. He made no effort to secure transportation from the abattoir to defendant's tracks in La Crosse. He brought suit, and recovered a verdict for $1,101.42 damages for breach of defendant's contract to ship. Defendant's motion to set aside the verdict as against the evidence was denied, and judgment for plaintiff entered.

For the appellant there was a brief by *Losey & Woodward*, and oral argument by *G. M. Woodward*.

For the respondent there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee*.

DODGE, J. 1. The power of the corporation to make the contract in question is strenuously denied. That contract,

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in its ultimate analysis, was merely to transport merchandise between two points, neither of which is on its own line,— over which, however, most of the carriage was to be. While such a contract, involving either the delivery over another road beyond its own line, or the bringing of merchandise over another line to its own, has much support from well-considered decisions, we need not here decide it. Whether *ultra vires* or not, the defendant cannot raise that question against the plaintiff here. *John V. Farwell Co. v. Wolf*, 96 Wis. 10; *McElroy v. Minnesota P. H. Co.* 96 Wis. 317.

2. The question of the station agent's authority to make such contract is simplified by the fact, apparent from the record, that both reliance on apparent authority and ratification were eliminated by the court below, and the jury only required to pass on the issue of actual authority, as to which the instructions are not excepted to. We need only inquire, therefore, whether there was any evidence of such actual authority. Danielson was defendant's freight and passenger agent at La Crosse, to solicit and contract for and manage the freight business done by the company at that place. The business establishments of that city extend over a considerable territory, not all within the city limits, and contiguous to different railroad tracks or to none. Any freighting business of this municipal and business settlement would seem from the evidence to fall within the scope of this agency, but defendant offered direct testimony that Danielson's agency did not extend to the abattoir in question, because not on defendant's tracks, and because outside the city limits. The significance of these distinctions is met, however, by evidence, without contradiction, that this agent, as also his predecessors, has always represented the company in its dealings with freighters on the tracks of other roads, and also with reference to certain establishments outside the city limits. In addition, certain corre-

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spondence as to this very transaction, between the agent and the general freight agent of the company, tends strongly to evidence the understanding of both that any such dealings which the company might have fell within the province and duty of Danielson. We think there was evidence to support the conclusion of the jury that he had actual authority in the premises.

3. Was there evidence that a contract to carry this ice was made? We think it plain that none was made between defendant and plaintiff at the time of Mr. Baker's visit. The evidence tends strongly to show that any promise then made was to Baker, and not to plaintiff; but, even if the promise to transport the ice was then made to plaintiff, it constituted no contract, for he entered into no reciprocal agreement, nor did he change his position to his hurt. There was an entire lack of mutuality. If plaintiff's evidence is believed, however, the earlier transactions were sufficient to constitute a contract. The defendant, in order to induce plaintiff to buy the ice, from which it anticipated benefit, made the promise to transport from the abattoir to Springfield for $2 per ton; and, on the faith of that promise, plaintiff changed his position and bought the ice. Here are all the elements of contract: A promise upon a sufficient consideration,— whether of benefit to the promisor or of injury to the promisee is immaterial, though both appear to be present. We think there was evidence to go to the jury of the making of this contract. There was also evidence of its breach, in that it appeared that Danielson notified plaintiff that defendant could not furnish him cars and take his ice from the abattoir. After definite notification to such effect, no purpose could be served by repeated demands, which both parties knew could not be complied with.

4. On the question of damages, the position taken by the defendant's attorneys was that the price paid by the plaintiff for the ice was the limit of his damages, from which, of



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course, must be deducted anything that by reasonable diligence could have been realized for the ice. The court, however, instructed the jury that as to twenty cars of ice, which the evidence showed could have been sold to Baker for $2 per ton if the defendant had carried out its contract, the measure of damages was the loss of this price, less the expense of loading and any other expense accompanying the shipping, and less, also, such sum as the plaintiff could have obtained for the ice upon sale to other parties, together with interest from the commencement of the suit, and, at the request of the defendant, instructed them that it was the duty of the plaintiff to exercise reasonable diligence to dispose of the ice in some other way after he found it could not be shipped to Springfield over the defendant's road. We think the rule of damages laid down by the court was substantially correct. The action was for breach of contract, not for misrepresentation. It was in evidence that the 600 tons, or twenty car loads, were absolutely sold for $2 a ton, which sum would have been received by the plaintiff but for the defendant's breach of its contract. We see no vice in this theory. It measured the injury which the plaintiff received by reason of the defendant's breach, as shown without conjecture or uncertainty.

The damages awarded upon the verdict were evidently upon the theory that 570 tons of ice (being the twenty car loads, less one car load as to which no breach occurred) were lost to the plaintiff, and would have yielded him $2 per ton, less about ten cents per ton for loading. There is evidence to support the proposition that plaintiff made reasonably diligent efforts to sell this ice to others, without success, and that he was unable to satisfy his contract with Baker, or otherwise to dispose of the ice to customers whom he could reach by shipment over the Chicago, Milwaukee & St. Paul road, but it is admitted there was no effort on his part to overcome the obstacle between the abattoir and the tracks of the defendant's railroad

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at La Crosse. It needs no evidence to show that, if he had tendered the ice upon the tracks of the defendant within that city, he could have fulfilled his sale and realized his $2 per ton. Nor does it require any evidence — although evidence there is — to establish that he might have shipped the ice from the abattoir over the Chicago, Milwaukee & St. Paul road into the city of La Crosse; and, while the expense to him is not rendered entirely certain, there is enough in the evidence to show that it must have fallen far below the $2 per ton damages which he claims. There might almost be said to be common knowledge that if the rate of carriage from La Crosse to Springfield, Ill., were $2 a ton, the rate for the few miles from the abattoir to La Crosse city would have been but a small fraction of that; and it was shown that, even if the ice needed to be changed from one car to another after reaching La Crosse, the expense of that transaction was but a trifling percentage of $2 per ton. The plaintiff offered in evidence a letter from the general freight agent of the defendant wherein it is stated, somewhat ambiguously, that a five-mile haul from the abattoir to La Crosse would, at full tariff rates, cost but three cents per hundred, or sixty cents per ton. It is also matter of common knowledge that it was physically possible to haul this ice by teams from the abattoir to some point on the defendant's tracks within two miles of it; and it appears, by plaintiff's own testimony, that some negotiation took place between him and defendant's agent with reference thereto, and he offered in evidence two letters from that agent to his superior, one stating that the ice could be hauled at from twenty-five to thirty cents per ton, and the other indicating estimates by the plaintiff himself of thirty-five cents per ton. It was, of course, the duty of the plaintiff, before allowing this ice to spoil and become entirely lost, to make every reasonable exertion to realize from it. If he could not sell to others, and could have availed himself of this sale by incurring ad-

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ditional expense, it was his duty to incur that expense, so long as it was less than the damage otherwise to result; and it appearing affirmatively that he made no exertion whatever in the latter direction, and there being evidence showing that the expense thereof would have been far less than the damage now claimed to have been suffered, we think it clear that the amount of the verdict recovered is not sustained by the evidence. Whether, as shown by Mr. Danielson's letter, this ice could have been placed upon the defendant's cars on its own tracks by the use of teams at an expense of thirty cents per ton, or whether it would have cost the sixty cents for local freight tariffs over the St. Paul, the evidence is perhaps too indefinite to make clear; and we do not, therefore, feel justified in specifying a minimum to which the plaintiff, in his option, may remit, but are satisfied that the evidence shows that he might have avoided the loss of this ice, by reasonable diligence, at an expense far less than the amount of the present recovery. For that reason the verdict should have been set aside, upon defendant's motion, as not supported by the evidence, and a new trial awarded.

*By the Court.*— Judgment of circuit court reversed, and cause remanded for a new trial.

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WITHEE, Appellant, vs. SIMON, imp., Respondent.

*September 9 — September 26, 1899.*

***Bills and notes: Issue as to genuineness of signature: Filing of affidavit at trial: Discretion.***

**In an action upon a promissory note, where a defendant's answer denying the making of the note was not sufficiently specific, under sec. 4192, Stats. 1898, to put in issue the genuineness of his signature, it was within the discretion of the court, under secs. 2830, 2831, to permit him, on the trial, to raise that issue by filing the required affidavit, without granting a continuance thereupon asked for by plaintiff, no prejudice to the latter being shown.**

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Withee vs. Simon.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Affirmed.*

The complaint stated, in substance, that January 4, 1896, plaintiff and others loaned to defendant Holbek $500 for a period of two months at eight per cent. interest per annum upon said Holbek's note indorsed by defendant *Simon;* that said note was renewed at its maturity, and the renewal note thus renewed, each of the notes being indorsed as before; that the third note was renewed for three months by a joint note of Holbek and *Simon*, which, upon maturity, was renewed by a like note, and that in turn likewise renewed, and that also renewed, the last note bearing date May 6, 1897; that plaintiff was then the lawful owner and holder of such note and of the claim for the original consideration for the transactions mentioned, and that there was then due to him thereon the sum of $500 with interest thereon at the rate of eight per cent. per annum from the date of such note, for which judgment was demanded. Defendant *Simon*, by answer duly verified, denied on information and belief the making, signing, indorsing, or execution by him of either of the alleged indorsed notes, and denied positively and of his own knowledge the facts alleged connecting him with the alleged joint notes.

On the trial *Simon* was permitted against objection to file an affidavit denying the signing by him of the alleged indorsed notes, whereupon plaintiff applied for a continuance, which was denied. No affidavit of prejudice, because of the ruling of the court on the application of defendant as aforesaid, was filed. All the notes mentioned in the complaint were received from Holbek by plaintiff, and purported to have been signed as alleged in the complaint, but no definite proof was produced to show that the signature of *Simon* was genuine. The only note produced on the trial was the last one. *Simon* testified that he never indorsed or signed any of the notes, and there was considerable expert evidence

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all one way to the effect that what purported to be his signature was a forgery. There was no proof that any steps were taken to fix the liability of *Simon* as indorser upon any of the notes.

The court ruled that there could be no recovery in any event except on the last note, and submitted to the jury the question of the genuineness of what plaintiff claimed to be *Simon's* signature to such note. The verdict was against the plaintiff, and judgment was accordingly rendered in favor of *Simon*, whereupon plaintiff appealed.

For the appellant there was a brief by *Bleekman, Bloomingdale & Bergh*, and oral argument by *F. H. Bloomingdale* and *A. E. Bleekman*.

For the respondent there was a brief by *Winter, Esch & Winter*, and oral argument by *Frank Winter*.

MARSHALL, J. Several errors were assigned and argued at considerable length in the brief of counsel for appellant, to each of which respondent's counsel make reply, and in addition make a general claim that no proof was produced of the genuineness of the signature of respondent to any of the notes, and that the judgment is right on the undisputed evidence.

There is no question but that the burden of proof was on plaintiff to prove that *Simon* became a party to the notes, as the issues were finally made up for trial. It is contended, however, on the part of appellant, that the answer as to the indorsed notes was not in compliance with sec. 4192, Stats. 1898, under which signed or executed written instruments *prima facie* establish the genuineness of the signature or execution in the absence of any specific denial by the person purporting to have executed or signed the same, of such signature or execution, by his affidavit or pleading, duly verified; and that the signature of *Simon* as to such indorsed notes was not in issue till respondent was permitted to com-

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ply with such statute by filing an affidavit on the trial. The ruling on the application for leave to file such affidavit is the first assignment of error called to our attention.

It was clearly within the discretionary power of the court to allow the filing of the affidavit, saving the rights of plaintiff, however, from prejudice by reason of granting such favor. It is familiar to the profession that trial courts, under the statutes of this state and the established practice, have very broad power in such matters, and the exercise of it cannot be successfully called in question except for a clear abuse of judicial authority. Secs. 2830, 2831, Stats. 1898, clothe courts of record with express power, in furtherance of justice and on such terms as may be just, on the trial or at any stage of the action, either before or after judgment, to allow a party to correct a mistake of any character, with some exceptions not necessary to be noted here, without terms, even that of a continuance, no affidavit or proof being presented or facts appearing showing injury to the adverse party. The genuineness of the signature of *Simon* to the last note being in issue, it is manifest that the changed situation did not require any other proof than that which was necessary on plaintiff's part to meet the issue raised as to the last note.

The complaint respecting the ruling putting appellant to his proof as to the genuineness of respondent's signature to the first three notes being disposed of, if a claim made by respondent that appellant failed to produce any satisfactory evidence on the question of such genuineness as to any of the notes be sustained by the record, the consideration of any other question will be unnecessary.

After a careful reading of all the evidence bearing on respondent's alleged connection with the notes, we are unable to find where appellant produced any definite evidence on the question, while *Simon* testified distinctly and positively that he did not sign either note as maker or indorser,

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and that what purported to be his signature in every case was a forgery. That evidence was corroborated by five experts in handwriting, and other evidence. In fact the evidence is substantially all one way on the question, so that the motion which was made by respondent for a nonsuit before the case was submitted to the jury should have been granted, and if the verdict had been rendered for the appellant it would have been the plain duty of the court to have set it aside at once upon respondent's application therefor.

*By the Court.*— The judgment of the circuit court is affirmed.

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NEW HOME SEWING MACHINE COMPANY, Respondent, vs. SIMON, Appellant.

*September 11 — September 26, 1899.*

*Guaranty: Conditional delivery by guarantor to proposed debtor: Notice to guarantee: Evidence: Release: Special verdict: Change in question: Instructions to jury.*

1. Where a guaranty of payment for goods to be sold on credit was delivered by the guarantor to the proposed debtor with the understanding that until it had been signed by another guarantor it was not to be delivered to the guarantee, and the guarantee, to whom the instrument was delivered in violation of said understanding, had knowledge of the facts before extending credit, he cannot hold the guarantor liable, unless the latter has been guilty of some act amounting to an estoppel.
2. Evidence of such an understanding between the guarantor and proposed debtor is admissible as against the guarantee although he was not present at the time, if he afterwards had notice of the fact before extending credit.
3. Negotiations between the guarantee and the proposed debtor in regard to limiting the liability of the guarantor to a smaller sum than that stated in the guaranty, which were finally relinquished, and the original contract adhered to, and notice of its acceptance thereafter duly given, did not release the guarantor from liability.

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4. A change in one of the questions submitted for a special verdict, made after plaintiff's attorney had finished his opening argument to the jury, was not prejudicial to defendant, whose counsel had, thereafter, full opportunity to argue the question to the jury and to prepare suitable requests to instruct.
5. Where a special verdict is to be rendered, the court should not give general instructions on the law of the case, from which the jury can readily tell the effect of their answers, but should give only such instructions on the law as will enable the jury to make intelligent answers to the questions propounded.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

The complaint in this action alleges that one R. L. C. Holbek, being desirous of purchasing and handling sewing machines, applied to the plaintiff for credit. He was informed that it would be necessary for him to furnish security; whereupon the defendant, *Mathias Simon*, executed and delivered to plaintiff an instrument in writing in the form of a letter of credit, wherein he agreed to guaranty the payment of the value and price of such goods as might be sold to Holbek, to an amount not exceeding $2,000. The plaintiff sold machines and supplies to Holbek from time to time, and at the date of commencement of suit he was indebted to plaintiff in the sum of $1,989.61. The defendant answered that the instrument mentioned, according to agreement between the parties, was to have been signed by another surety before it was to take effect; that defendant was never notified that plaintiff accepted the instrument; and that subsequently, by agreement between plaintiff and Holbek, the contract was modified, and the paper was delivered as a guaranty for $1,000 and no more.

Upon the trial the following special verdict was rendered: "1. Did the plaintiff notify the defendant on the 9th of September, 1895, that it accepted the letter of guaranty signed by said defendant? *A.* Yes. 2. In case you answer the preceding question in the affirmative, then were sales

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made by the plaintiff company from the 9th of September, 1895, to June 23, 1897, to R. L. C. Holbek, upon the faith and strength of the letter of guaranty? *A.* Yes. 3. At the conference between Emil Simon and the defendant, on the 9th day of September, 1895, did the defendant give Emil Simon any notice that he would not be bound by the letter of guaranty, for the reason that it had not been signed by another surety? *A.* No. 4. Did the plaintiff company, at the close of the conversation on the 9th day of September, 1895, between Emil Simon and the defendant, have knowledge of sufficient facts in respect to this letter of guaranty, as to the manner in which this letter of guaranty was signed, to put a reasonably prudent man on inquiry as to whether there was to be another signer before the defendant was to be bound? *A.* No. 5. Did the plaintiff, within a reasonable time after the ceasing to give credit to R. L. C. Holbek, give notice to the defendant that said Holbek was in default, and that it would look to the defendant as guarantor? *Answer by the court.* Yes. 6. What balance was due the plaintiff from R. L. C. Holbek for sewing machines and sewing-machine supplies furnished by the plaintiff to said R. L. C. Holbek between the 9th of September, 1895, and the commencement of this action? *A.* $1,400. 7. In case the plaintiff is entitled to recover, at what sum do you assess its damages? *A.* $1,400, without interest."

The plaintiff moved to set aside the answers to questions 6 and 7, as being contrary to the undisputed evidence, and for judgment for $2,000, which motion was granted. The defendant moved to set aside the verdict, and for a new trial, for certain specified errors, which motion was denied. The defendant brings the case to this court for review.

For the appellant there were briefs by *Winter, Esch & Winter*, and oral argument by *Frank Winter.*

For the respondent there was a brief by *Fruit & Gordon*, and oral argument by *G. H. Gordon.*

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BARDEEN, J. One of the main issues raised by the defendant's evidence was whether the instrument sued upon ever had legal inception. The defendant claimed that the paper in question was delivered to Holbek upon the express understanding that it was not to be delivered to plaintiff until Holbek had secured another signer thereto, and that he notified plaintiff's agent of that fact before any credit was extended to Holbek. On the trial the defendant attempted to show the understanding between himself and Holbek in regard to securing another signer to the paper, which testimony was excluded by the court, on the ground that "any talk or conversation between himself and Holbek would not be competent, in the absence of representatives of the plaintiff." The court, however, permitted defendant to testify that when plaintiff's agent called at his store, on September 9, 1895, before any credit had been extended to Holbek, he told him that he signed the paper with the distinct understanding that there was to be another bondsman when delivered. Thus, under the ruling of the court, the defendant was allowed to prove but one half of his defense. It was certainly no defense to the action that defendant told plaintiff's agent that the paper was conditionally delivered, unless such was the fact. His complete defense rested upon the fact that there was an understanding between himself and Holbek that the instrument should not be delivered until another signer thereto was obtained, and that plaintiff had notice of such understanding before it extended credit thereon. The fact that plaintiff's representative was not present at the talk between defendant and Holbek is of no importance, if knowledge of the understanding was brought home to plaintiff before it accepted the instrument and extended credit relying thereon.

The rule prevails in this state that a surety who signs a bond and delivers it to his principal cannot avoid liability on the ground that it was the understanding that it was not

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to be delivered until some other person executed the same, when it appears that the person for whose benefit the contract was made had no notice of such condition, and nothing to put him upon inquiry as to the manner of its execution. *Belden v. Hurlbut*, 94 Wis. 562. If, however, the party for whose benefit the bond is given has notice of such conditional delivery, or of such facts as would put a prudent man upon inquiry, he cannot enforce liability thereon. It was therefore very much to the defendant's interest to show that the instrument in suit was conditionally delivered to Holbek, and it made no difference that no representative of the plaintiff was present if notice of the fact was duly given.

In line with this view of the case, the defendant requested the court to submit certain questions and give certain instructions to the jury, from which they might determine the defendant's liability, all of which were refused. The questions touching this branch of the case are Nos. 3 and 4, set out in the statement of facts, and which fall far short of covering the vital issue. The jury might well have concluded that, inasmuch as there was no proof of a conditional delivery to Holbek, there was nothing in the conversation of September 9th to put plaintiff's agent on inquiry.

It appears that after Holbek had transmitted the guaranty to plaintiff, and before it was accepted, there was an agreement between them that defendant's liability thereon should be limited to $1,000. This fact is urged as releasing defendant from all liability. To make a contract of this kind binding, there must have been (1) a making and delivery by the obligor, (2) a receiving and accepting by the obligee, and (3) a notification of such acceptance given by the obligee to the obligor. The evidence fairly shows that acceptance and notification was not given until September 9th, and the negotiations regarding limiting liability were had before that time. The contract not having ripened until after acceptance and notice, we do not very well see how

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the defendant can escape liability, when it is shown, without dispute, that the former negotiations were relinquished, and the original contract adhered to, and notice of its acceptance duly given. The motion to direct a verdict upon this ground was properly denied.

The defendant complains that question No. 3 of the special verdict does not cover any issue in the case. If we understand the evidence, there was no claim that defendant notified plaintiff's agent he would not be bound by the letter of guaranty because it had not been signed by another surety. The claim was that there had been a conditional delivery to Holbek, and that plaintiff's agent was notified of that fact. If such delivery was conditional, and notice of that fact given plaintiff before it extended credit to Holbek, the plaintiff had no right to sell goods relying upon such guaranty, unless there was something in the talk or conduct of defendant, on September 9th, which would have warranted the agent in believing that he did not intend to insist upon the invalidity of the instrument. The fact that the agent then notified defendant that plaintiff would extend credit to Holbek did not call for any protestation from him that he would not be bound by the letter of guaranty. When knowledge came to plaintiff, if it did so come, that the letter of guaranty had been wrongfully delivered, it had no right to ignore the fact. It proceeded thereunder at its peril, and, unless defendant is guilty of some act that would amount to an estoppel, is without remedy.

After plaintiff's attorney had finished his opening argument to the jury, the court made a change in one of the questions in the special verdict. This is urged as error. We are unable to perceive how the defendant was harmed thereby. His counsel had full opportunity to argue the question to the jury, and ample opportunity to prepare suitable requests to instruct. If any one was injured it was the plaintiff, and it is not complaining.

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In charging the jury the court prefaced its instructions as to the special verdict by giving general instructions on the law of the case, and from which the jury could readily tell the effect of their answers. This practice has been frequently condemned. *Kohler v. West Side R. Co.* 99 Wis. 33, and cases cited; *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215. The object of the special verdict is to ascertain the truth as to certain prominent facts in the case. They being established, the court applies the law and gives judgment accordingly. General instructions as to the law are likely to lead the jury into confusion, and to induce a verdict one way or the other to meet the sympathies or in obedience to the prejudices of individual jurors. Only such instructions on the law should be given as to enable the jury to make intelligent answers to the questions propounded. That being done, the full duty of the court has been performed.

Other errors have been urged, but are not considered of sufficient importance to require special mention.

*By the Court.*— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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KICKHOEFER, Respondent, vs. HIDERSHIDE, Appellant.

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*September 11— September 26, 1899.*

***Malpractice by physician: Trial: Setting aside verdict: Evidence: Cross-examination.***

1. In an action against a physician for malpractice in treating plaintiff for a fractured wrist, it is *held* that the evidence wholly failed to show, except as to one of the several items or phases of the injury, that they resulted from any negligence or malpractice on the part of defendant or that they were not the natural and legitimate results of the accident; and it appearing, from the method of the trial and from the size of the verdict, that the jury did not confine themselves to the one phase of injury as to which a recovery could

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be sustained, but awarded damages for injuries which the defendant did not cause, the verdict should have been set aside as contrary to the evidence.

2. The question being as to whether defendant had failed seasonably to administer passive motions to plaintiff's hand, and a witness for plaintiff having testified to giving movement to the hand some weeks after the accident, it was error to refuse to permit him to be asked, on cross-examination, whether he had at any time heard defendant advise plaintiff to give passive motions to the hand, and whether plaintiff had told him (witness) that she had had passive motions given before he gave them.

APPEAL from a judgment of the circuit court for Trempealeau county: O. B. WYMAN, Circuit Judge. *Reversed.*

Defendant, a physician, attended and treated plaintiff for a fractured wrist from the time of a fall, February 9th, to April 26th following, at which time he was discharged. The wrist was then seriously distorted, and its use impaired, the arm atrophied, the shoulder considerably stiffened, and the hand and fingers stiff and somewhat shrunken. She received treatment from other physicians, including a severe surgical operation to straighten and mobilize her wrist, and at the time of trial had in large measure, though by no means entirely, recovered. She sued plaintiff for malpractice, alleging all of the above-mentioned results as the basis of damages, and recovered verdict and judgment for $2,000, from which defendant appeals.

For the appellant there was a brief by *John C. Gaveney* and *Brown & Abbott*, and oral argument by *Mr. Gaveney* and *Mr. L. L. Brown.*

For the respondent there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee.*

DODGE, J. 1. The principal error relied on by appellant is the denial of his motion to set aside the verdict as not supported by the evidence. The evidence was very voluminous, and as, in the consideration of this question, no gen-

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eral rules are to be deduced therefrom, it would be but needless verbosity to set it forth *in extenso* here. Suffice it to say that, after a most careful examination, we are constrained to the conclusion that as to but one of the items or phases of the injury is there any evidence to go to the jury tending to show negligence or lack of reasonable care, judgment, and professional skill on the part of the defendant responsible therefor. Cases of this sort, where the very substantial injury and extreme suffering on the part of the plaintiff are so apparent, appeal strongly to the sympathies both of court and jury, and in the trial the duty upon the court is all the greater to very carefully consider the relationship between the treatment of the physician and the results to the patient, and to guard against submission of the case to the jury in such form that their sympathies may have an opportunity to visit upon the defendant liability for those injuries which are but the unfortunate result of the accident itself, and not of his treatment.

We are unable to find any evidence upon which the jury should have been permitted to consider whether malpractice on the part of the defendant was responsible for the condition of the plaintiff's shoulder. That condition was undoubtedly a serious one at the time when, some nine months after the accident, Dr. Gunderson found it necessary to administer anæsthetics and break loose adhesions. The testimony of the expert physicians is practically without contradiction that the defendant's diagnosis of neuritis, induced by an injury to the nerve at the place of fracture, as responsible for the severe pains extending to the shoulder, was justified and correct, and that such neuritis, followed, as it was and naturally would be, by lack of motion in the arm and impaired nutrition, was sufficient to account for the subsequent condition of the shoulder, and that, if so, there was nothing which the physician could have done to prevent that result. The only evidence on which responsibility is

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sought to be ascribed to the defendant for this condition of the shoulder is the testimony of one or two of the physicians that if the plaintiff fell upon her shoulder she might have fractured the acromion process or she might have bruised the shoulder, in either of which events her physician should have treated it to allay inflammation, which, confessedly, the defendant did not do. The theories upon which these criticisms are based are, however, entirely and conclusively exploded. The existence of any fracture of the acromion process is negatived by the very careful examination, made while the patient was under anæsthetics, by Dr. Gunderson; and both that injury and existence of a bruise are negatived by the symptoms which plaintiff herself establishes, namely, that the shoulder was free from stiffness, and capable of full movement, for a considerable time after the injury, and that the stiffness and loss of mobility were a subsequent development,—symptoms which the physicians without dissent declare to be inconsistent with an actual physical injury to the shoulder at the time of the fall.

With reference to the treatment of the fracture itself and its immediate locality, the testimony is again all one way, and without substantial dispute, to the effect that the defendant's treatment was consistent with surgical skill, due care, and sound judgment. The placing of the splints, the binding of them, the resetting of the bones after being thrown out of apposition by muscular spasms, and the refraining from effort to break down the partial union which defendant found to have taken place at a time some sixteen days after the injury, when he first discovered the bones slightly out of apposition, are all approved as proper without practical conflict. True, some of the physicians expressed doubt as to whether union, such as to be difficult to break down, could have taken place between an examination on the 18th, when no displacement was discovered, and the 26th of February, when the displacement was discovered. Others sus-



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tain the possibility of such union, but the fact of union such as to render a severe effort necessary, testified to by the defendant, is certainly not overcome nor put in issue by these hypothetical doubts. The very complete disablement of the wrist, resulting as it did in some distortion, and necessitating a painful and expensive operation, was largely due to an excessive secretion of callus, joining together the radius and ulna. This, it is conclusively shown, was not a result which a skilful physician, in the exercise of sound professional judgment, would have foreseen as the result of the treatment, but one which might have resulted from various causes constitutional to the patient,—neuritic condition, before mentioned, among them. True, the slight displacement at the fracture undoubtedly tended to increase the callus, but there again the physicians are without conflict that it should not have been expected to lead to a formation such as to be injurious. In brief, the evidence wholly fails to show that the disabled condition of either the shoulder or the wrist, or the atrophied condition of the arm, were the result of any negligence or malpractice on the part of the defendant, and were not the natural and legitimate results of the accident suffered by the plaintiff, and for which the defendant was not responsible.

A third class of resulting injury charged against the defendant is an ankylosed condition of the joints of the hand and fingers, whereby the motion of the hand was considerably impaired, some painful treatment has been necessary since, and slight impairment of mobility in the fingers still exists. This is claimed to be due to the alleged fact that the defendant used a splint extending on the back of the hand to the end of the fingers, and bound the fingers firmly to that splint, and kept them so bound for a period of five weeks after the injury, and did not earlier administer passive motions. There is conflict of testimony as to these facts. There is also conflict of testimony as to whether such

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treatment, if it took place, was proper and consistent with due skill and care. It may be that an issue of fact was fairly raised as to whether there was erroneous treatment responsible for this injury, and a recovery therefor might have been justified. It, however, was not suggested to the jury that they must consider that injury alone, distinguished from the wrist and shoulder; and although the defendant is perhaps not in a condition to complain of such omission as a specific error, he having requested no instructions in that direction, yet the method of trial, accompanied by the size of the verdict, leads irresistibly to the conclusion that the jury did not confine themselves to this one phase of injury. A verdict of $2,000 would be very clearly excessive for such degree of impaired use of the hand and fingers as is shown by the evidence. The conclusion being irresistible that the jury have awarded damages for injuries the defendant did not cause, the verdict, as rendered, is contrary to the evidence, and it was error not to have set it aside on the defendant's motion.

2. It is alleged as error that the court refused to permit the witness Hutz to answer, on cross-examination, the questions: First. "Did you at any time hear *Dr. Hidershide* advise *Tina* [the plaintiff] to give passive motions to this hand?" Second. "Did the plaintiff tell you that she had had passive motions given before you gave it?" The witness had testified that he assisted the defendant in the treatment of the plaintiff, described that treatment, testified to having given movement to her fingers and hand himself at a time fixed at four, five, or six weeks after the injury, and to conversations with her. The dispute was as to whether the fingers had been released from the bandage and given motions earlier than this, as to which fact there was direct conflict of evidence. We see no excuse for excluding this evidence. It was within the general scope of the direct testimony called out by the plaintiff from this witness, and

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it bore directly upon the one principally controverted issue in the case. If the answers had been in the affirmative, they would have tended to refute the testimony of the plaintiff and certain of her witnesses as to the long-continued immobility of the hand. We think the refusal of this cross-examination was error, and for that reason, in conjunction with the other error above pointed out, the judgment must be reversed and a new trial had.

*By the Court.*— Judgment reversed, and cause remanded for a new trial.

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BUEL, Plaintiff in error, vs. THE STATE, Defendant in error.

*September 12 — September 26, 1899.*

*Criminal law and practice: Homicide: Evidence:* Corpus delicti: *Circumstantial evidence: Cross-examination: Instructions to jury: Defining "reasonable doubt:" Material and immaterial errors.*

1. The *corpus delicti*, and every element of it, in a criminal case may be established by circumstantial evidence as well as by positive or direct evidence, if such circumstantial evidence produces in the minds of the jury conviction, to a moral certainty, of the existence of all the requisite facts and excludes every other reasonable hypothesis.
2. The reception of irrelevant evidence against objection, prejudicial, if at all, by reason of an unwarranted use of it by counsel in addressing the jury or significance given to it by the instructions of the court, is not reversible error.
3. The right of cross-examination extends to a reasonable inquiry into the previous life and character of the witness, so far as the same bears on the credibility of his evidence, and the extent to which such examination may be carried rests in the sound discretion of the court, though it is an abuse of judicial authority to allow questions to a witness as to irrelevant matters, regardless of whether there are any circumstances reasonably suggesting them or they reasonably bear on his credibility, and for the purpose of creating, or which are manifestly calculated to create, prejudice in the minds of the jury against the witness, and, if he be a party, influence them to find against him because of such prejudice.

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4. For the purpose of explaining the circumstance that soon after a homicide for robbery the supposed guilty party was much improved financially, he testified that a few months before the homicide he and the deceased conducted a profitable partnership business; and to rebut that the court permitted a memorandum book of the deceased in evidence, saying that it tended to impeach the evidence of the accused, which book did not show, definitely, that it was other than a personal memorandum book; there was no evidence that the accused ever saw or was in any way concerned with it; and it did not refer, intelligently, to any business transactions between the accused and the deceased. *Held*, prejudicial error.
5. Evidence of threats made by third persons against the deceased was properly rejected, because, if offered to show motive for his leaving the country, it was irrelevant in the absence of evidence that he had knowledge of the threats; further, there was no controversy as to the real motive, and if offered to show that some other person than the accused was the guilty party, the evidence was irrelevant and hearsay.
6. A refusal to instruct the jury on the subject of the certainty of the existence of the facts requisite to a conviction, *held* not reversible error, since the general charge contained full instructions on the subject.
7. The giving of properly worded, specific explanatory instructions on the subject of reasonable doubt at the request of the attorneys for the accused, approved and advised; but a refusal to do so, when the general charge is full and plain on the subject so as to be understood, reasonably, by persons of ordinary comprehension, *held* not reversible error.
8. The giving of special instructions on leading legal questions, as requested, or embodiment of them in the general charge, especially in an important case where such special instructions are more specific than the general charge, advised; but the refusal to do so when such general charge is sufficiently plain to be understood by persons of ordinary comprehension, *held* not error.
9. Instructions so worded as to be difficult to understand, and so worded as to admit, reasonably, of a construction that would mislead the jury on a material point, *held* reversible error.
10. A general order to strike out all the hearsay evidence admitted on a trial, made at the close of the trial, without specifying the particular evidence referred to, leaving it to the jury to determine what is and what is not hearsay evidence, *held* error.

[Syllabus by MARSHALL, J.]

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Buel vs. The State.

ERROR to review a judgment of the circuit court for Sawyer county: JOHN K. PARISH, Circuit Judge. *Reversed.*

The facts are stated in the opinion.

For the plaintiff in error there was a brief by *J. B. Alexander*, attorney, and *V. W. James*, of counsel, and oral argument by *Mr. Alexander.*

For the defendant in error there was a brief by the *Attorney General*, and oral argument by *C. E. Buell*, first assistant attorney general.

MARSHALL, J. The evidence produced on the trial established or tended to establish the following:

Peter F. Nelson,—an unmarried man of about twenty-four years of age, who had resided for a considerable length of time prior to the 17th day of September, 1896, with the plaintiff in error, *Eugene Buel*, a man of about thirty-six years of age, near the Indian reservation in a thinly settled district in Sawyer county about nine miles from the village of Hayward,—in August, 1896, was charged by one Wettenhall with being guilty of having sustained criminal relations with the latter's daughter and being the cause of her supposed condition of pregnancy. That resulted in Wettenhall and Nelson meeting a day or two thereafter, by appointment, at the village of Hayward, where Wettenhall insisted on Nelson marrying the daughter, which he declined to do. Soon thereafter, on the same day, on hearing that he was about to be prosecuted respecting the charge of causing the pregnancy of the Wettenhall girl, Nelson fled from the county and thereafter remained in hiding till about the 16th day of September following, when he met *Buel*, by appointment, at a railway station a short distance from Hayward, from which point the two traveled together to Hayward, arriving there about daylight on the succeeding day. The purpose of the trip to Hayward was to enable Nelson to draw some $400 which he had in the Sawyer

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County Bank and then leave the county before his presence at Hayward could become sufficiently known to lead to his arrest. Pugh, the cashier of the bank, was called upon by Nelson and *Buel* at his house before daylight on the day named and informed of the purpose of Nelson as stated, and that he intended to go to Chicago by way of Ashland. Pugh acceded to the request to immediately get the money for Nelson and to aid in keeping his presence in Hayward secret, and thereupon went to the bank and obtained such money, *Buel* and a policeman going with him, and Nelson remaining at the house. Pugh returned to his house with the money and paid it to Nelson, whereupon the latter and *Buel* immediately departed, going in the direction of *Buel's* home. The last that was seen of Nelson alive, he was in the company of *Buel* a few miles from the latter's home on the day in question.

On the day of the occurrence related, *Buel* was observed traveling on the road from Hayward toward his home alone, carrying a satchel, and later in the day he left his home with a pail and gun under the pretense that he was going to carry a lunch to Nelson; and still later the same day he returned home in a nervous condition and reported that Nelson complained that he had been chased by Indians. After the disappearance of Nelson as related, he did not write to any of his old neighbors or acquaintances as he was accustomed to do when away from home. *Buel*, during the time Nelson lived with him, was a very poor man and a very poor provider for his family, but after the latter's disappearance there was a significant change in that regard, and there were other things, such as the purchase of a tract of land by *Buel* for $200 and various articles of personal property, indicating that he was possessed of a considerable sum of money. He took possession of all the personal effects of Nelson and treated them in every way as his own.

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In July of the next year after the occurrences detailed in the foregoing, the remains of a human being were found lying on the back in a bunch of thick bushes a few miles from where Nelson was last seen with *Buel* and within about half a mile from an unoccupied homestead claim of *Buel*, and somewhat further from such a claim which belonged to Nelson. The location of the discovery was in an out-of-the-way place some four miles from any inhabited building except an old logging camp about a mile and a half away, which was occupied by a watchman. It was near an old Indian trail and the usual route from *Buel's* place of residence to his homestead claim. The fragments of the skull indicated that either before or after death it was broken in by some crushing blow or blows. The shoes were on the feet and the clothing was sufficiently preserved to show the color. No money or thing of value was found near the remains except a pocketknife, which was identified as one of two knives that had been sold by a merchant in Hayward, one of which was sold to Nelson. The trousers and shoes found on the remains were similar to those worn by Nelson.

Evidence was produced to explain or discredit much of the evidence of the circumstantial evidentiary facts mentioned, and to impair the probative force of circumstances established, pointing to the guilt of *Buel*. The jury found him guilty of murder in the first degree, and judgment was entered accordingly.

The motion to acquit the plaintiff in error and the motion to set aside the verdict for want of sufficient evidence to warrant a conviction were properly denied. Upon each vital question in the case there was credible evidence tending to establish the fact involved, contradicted or explained in many instances, it is true, by other evidence; but it was for the jury to weigh all the evidence and determine where the truth lay. Such determination is conclusive, unless we

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can say it was not warranted in any reasonable view of the evidence, and we clearly cannot say that. True, the evidence was all circumstantial, but that does not count strongly against the conviction, since a conviction may as well rest on circumstantial evidence as on direct evidence, if it has the necessary probative power to convince the mind beyond a reasonable doubt of the existence of each of the elements requisite to make out the charge and exclude to a moral certainty every other reasonable hypothesis. If the jury believed that the knife, shoes, and clothing found on the remains were those which formerly belonged to Nelson, such facts, in connection with the undisputed circumstance that he disappeared a few miles from where the remains were found and that their location was near his homestead where he was likely to have gone under the circumstances, in the absence of any satisfactory evidence that he was ever seen after the disappearance, or heard of or from, by anybody, or any evidence to suggest a probability of the remains being other than his, they might well and readily have said, as they did, that no doubt founded in reason could exist but that Nelson was dead and all that remained of his body was that discovered in the brush, as related. Having determined the initial question as indicated, that and the undisputed facts that when Nelson disappeared he had a large sum of money and probably a watch upon his person, that none of such property was found upon the remains, and that the skull was broken in such a way that if the injury was inflicted upon the person while living it necessarily caused death, certainly warranted the jury in saying that there was no reasonable theory of the cause of death other than that some human agency produced it, and that the crime of deliberate murder was committed. Having reached that point, the circumstances pointing to *Buel* as the guilty person were numerous. The facts that he was the only person known to have been in Nelson's company at about

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the time of the homicide, that he was the only person who knew Nelson had upon his person a large sum of money, and the further facts that his financial circumstances materially changed immediately after Nelson's disappearance, and that he appropriated all of Nelson's personal property to his own use without any satisfactory explanation of such conduct; that he pretended to have seen Nelson, and acted and talked strangely in regard to him, the day of the disappearance; and many other things which might be mentioned which appear in the evidence,—if not deemed by the jury to have been satisfactorily explained so as to leave a reasonable doubt in their minds as to the existence of any of such incriminating circumstances,—may well have moved them to conclude, as they did, that such circumstances were consistent with the theory that *Buel* committed the homicide, and inconsistent with any other reasonable hypothesis.

The argument on this branch of the case in behalf of plaintiff in error by his counsel only brings to our attention the fact that as to many of the circumstances mentioned the evidence was conflicting and was circumstantial. It is not claimed but that there was evidence bearing upon every essential question involved in the charge and every one of the evidentiary facts mentioned. That being the case, it was for the jury to weigh the evidence, and this court cannot test their determination by its own conclusion.

It appears to be strongly urged that the verdict was not warranted by the evidence as to the *corpus delicti*, because on that subject there must be positive evidence or circumstantial evidence of such probative power as to convince the mind beyond the possibility of error. To support that contention, *State v. Davidson*, 30 Vt. 377, was cited to our attention, where it is said that "the cases all hold that where the *corpus delicti* is attempted to be shown by circumstantial evidence, it must be positively established so as to exclude all uncertainty or doubt from the minds of the jury; not

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that each particular circumstance must be of that conclusive character, but all combined must produce the same degree of certainty as positive proof." That must be construed to mean that circumstantial evidence is competent and sufficient to establish every element of the *corpus delicti* if as convincing as positive or direct evidence. It recognizes the sufficiency of circumstantial evidence, and as to each element of the subject under consideration. Certainly, the learned judge did not intend to convey the meaning that the essential fact he was discussing must be established beyond the possibility of a doubt. His concluding language shows that the degree of certainty which leaves no reasonable doubt on the question is all that is required as to every element in a criminal homicide. Positive evidence, even, cannot go further than that in the practical affairs of life, and if greater certainty than that were required in a criminal prosecution, in order to warrant a conviction, punishment for crime would be well-nigh if not quite impossible, and the safety of human life be without adequate legal guardianship.

There are many authorities that might be cited to support the doctrine that positive evidence is required to establish at least the element of death by criminal means, and in many legal opinions language is used which would indicate a holding that positive evidence must go further and establish the fact of identity. In *Ruloff v. People*, 18 N. Y. 179, it was stated as the undisputed law, that no one should be convicted of murder upon circumstantial evidence unless the body of the person *supposed to have been murdered* has been found, or there be other clear, irresistible proof that *such person* is actually dead. Baron PARKE, in *Reg. v. Tawell*, a case not easily found reported in the books, but referred to in Wills, Circumstantial Evidence (3d ed.), 180, and contained in full in Trials for Murder by Poisoning, compiled by Brown & Stewart (1883), used substantially the same lan-

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guage, and the conclusion was reached that as to the death of the *party supposed to have been murdered*, positive evidence is necessary. Such appears to be the fair reading of the early New York cases, but that is denied, or if not denied overruled, in more recent decisions, as will be hereafter indicated. In *People v. Bennett*, 49 N. Y. 137, the same rule was applied, the opinion distinctly stating that in the *Ruloff Case* the basis of the *corpus delicti*, that the person *alleged to have been murdered* was not found dead, was wanting. That rule, it was supposed, was crystallized into statute law by section 181 of the New York Penal Code in the following language: "No person can be convicted of murder or manslaughter unless the death of *the person alleged to have been killed* and the fact of killing by the defendant, as alleged, are each established as independent facts; *the former by direct proof* and the latter beyond a reasonable doubt." But in *People v. Beckwith*, 108 N. Y. 67, it was held that positive evidence of facts bearing directly by way of inference on the ultimate fact to be established, satisfied the call of the statute for direct proof. There the facts established by direct evidence were quite similar in character to those here. The person supposed to have been murdered disappeared. Near where he was last seen fragments of a human body were found, on which were indications pointing to the probable means of his death, and the clothing found was testified to as that worn by the missing man. These circumstances and others, all established by direct evidence and all pointing to the existence of the ultimate fact sought for, it was said, constituted direct proof within the meaning of the statute and the rule requiring positive proof. A distinction was drawn between proof and evidence, the one being the medium of proof and the other the effect of evidence. The effect of that decision was to limit the requirement of positive evidence under the rule of the earlier decisions to evidence establishing evidentiary facts so as to enable every element

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of the *corpus delicti* to be established by circumstantial evidence as the term is commonly understood — evidence of facts which tend to prove the ultimate fact in issue. Later, the same subject was under discussion in *People v. Palmer*, 109 N. Y. 110, and the idea was rejected that either the statute of New York or previous adjudications of the court required positive proof of anything but the death of a human being by criminal means. It was said that a contrary rule would put a premium on brutality and prevent the punishment of criminal homicides, for the perpetrator would have the strongest motive possible to mutilate or destroy the body of his victim so that direct evidence of identity would be impossible. The conclusion reached was that the rule requiring direct evidence only applies to the fact of the death of a human being requiring investigation, and not to the identity of the subject of the homicide, and that if there is evidence of the existence of a dead human body having a fractured skull sufficient to produce death, accompanied by circumstances excluding all reasonable inference that it was produced by accident or suicide, the rule requiring positive evidence as to the *corpus delicti* is satisfied. It was further said that such rule never did include identity of the victim, but left that open to either direct or circumstantial evidence. This closes the review of authorities upon which counsel for plaintiff in error rely. They really leave but the fact of death to be proved by positive evidence, and hold that the discovery of fragments of a human body under circumstances pointing beyond a reasonable doubt to criminal means as the cause of death, fully satisfies the requirement for positive proof; and that direct and positive evidence of evidentiary facts from which the main fact is inferable with a certainty that excludes to a moral certainty every other reasonable hypothesis, is positive proof.

This court has spoken in no uncertain language on the subject under consideration. No question in regard to it is

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open in this state. A reference to authorities elsewhere is here made because of the importance of the question in this case, and to demonstrate the universality of the doctrine here applied. In *Zoldoske v. State*, 82 Wis. 580, the following language was used: "The substance of the offense may be proved as well by circumstantial as by direct evidence;" and further, quoting with approval from a standard text writer: "No universal and invariable rule can be laid down, and every case must depend upon its own particular circumstances; and, as in all other cases, the *corpus delicti* must be proved by the best evidence which is capable of being adduced, and such an amount and combination of relevant facts, whether direct or circumstantial, as will establish the imputed guilt to a moral certainty, and to the exclusion of every other reasonable hypothesis." No distinction is recognized between the different elements of a homicidal offense, as to the degree of certainty necessary to establish it, or the nature or the kind of proof required. Such is the view expressed by the text writers generally. McClain, Cr. Law, § 396; Underhill, Cr. Ev. § 312; 3 Greenl. Ev. § 30; Will, Circ. Ev. 354; 1 Bish. Cr. Proc. (2d ed.), § 1071. There are many striking illustrations of this doctrine in the books. In *Ex parte Kearny*, 55 Cal. 212, the body of the murdered man was destroyed by fire so that no part of it was ever discovered but some pieces of bone, not recognizable as human bones. In *State v. Ah Chuey*, 14 Nev. 79, the body was destroyed by fire beyond recognition. So in *Comm. v. Webster*, 5 Cush. 295, the body had been dissected and many parts of it completely destroyed, particularly the head, leaving no part that could be positively said to have been a part of the body of the supposed murdered man. In *State v. Williams*, 7 Jones Law (N. C.), 446, shortly after the disappearance of a woman, near a point where she was likely to have been some bones were found in the ashes of a burned log heap, and some hairpins were found likewise, similar to those she

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had worn. Numerous other instances might be cited where the body of the murdered person was destroyed by fire or acids or in some other way, many of which instances are referred to in Whart. Hom. § 640, and notes.

So it may be taken as the settled law that the *corpus delicti* in criminal homicide, and each element of it, may be established by circumstantial evidence, and that no greater degree of certainty is required than in regard to the fact of the guilt of the person charged. Any language in *State v. Davidson*, 30 Vt. 377, indicating that the former element must be established with such certainty as to exclude any doubt on the question, is not correct. True, the initial question when criminal homicide is charged is, Was a human being deprived of life by criminal means? and the next question, Was he the person alleged to have been murdered? And such questions, particularly the first, because of their supreme importance, require, ordinarily, stronger evidence than the questions which follow. Such importance is obvious from the well-known fact that convictions and executions have taken place, and thereafter the persons supposed to have been murdered have been discovered alive. The more important the question in any case, the greater the proof required to establish moral certainty in the mind, but when that certainty is established, whether by circumstantial or direct evidence, the fact itself must be said to be established. Enough has been said to show that there was ample evidence in this case to go to the jury on every element of the *corpus delicti*, and that the assignments of error on that subject cannot be sustained.

The state was permitted to show against objection that after Nelson disappeared it was discovered that the charge against him, founded on the theory that the Wettenhall girl was pregnant, was without foundation. That evidence was drawn out as a basis for a claim before the jury, as it is said, that *Buel* knew before Nelson disappeared that the latter

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was in no danger from the Wettenhalls, and that he purposely omitted to disclose such knowledge to his intended victim in order that he might have the benefit of Nelson's reputed departure from the county to avoid a criminal prosecution, to account for such disappearance without the finger of suspicion being turned upon him; and the court submitted that theory to the jury by the charge. It seems that no proof was offered as to when the true condition of the Wettenhall girl was discovered, whether after Nelson disappeared or before, and no evidence was given that the charge against Nelson was fraudulently made, or that *Buel* was a party to a scheme to put Nelson in fear of the Wettenhalls, or that the fact, if it were a fact, that Nelson was falsely charged, was known to *Buel* at any time; so the mere circumstance that it was discovered, some time subsequent to the disappearance of Nelson, that the claim made by the Wettenhalls against him was false, was wholly foreign to the case and ought not to have been received, though we see no reason to claim that the mere admission of the evidence could possibly have worked prejudicially to the plaintiff in error. If he was in any way injured, it was by the use counsel for the prosecution made of the evidence in addressing the jury, and the reference to it in the instructions given by the court; and that is the only prejudice seriously claimed. The difficulty of treating the matter is that the remarks of counsel were not preserved or excepted to, neither were the instructions of the court referring to the evidence excepted to. We must hold that the admission of the evidence was harmless error, and that if error was committed in the use of it, either by the attorney for the prosecution in summing up his case or by the court in instructing the jury, or both, such errors have not been preserved for consideration.

The court against objection permitted the prosecuting attorney on cross-examination to ask the accused these questions: "Did you have any trouble with any man there in

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that house while you were there?" "Do you remember of making an assault upon a man there and breaking his arm?" "Did you kill a man at Ord, Nebraska?" "Did you kill two men at Ord, Nebraska?" "State the trouble you had at Ord that caused you to leave there?" "Did the insurance company give you any reason for not giving you the insurance money?" referring to the insurance on a house belonging to the accused which was burned. "Did you ever have any talk with any of them that the reason they would not pay it was that you burned the house yourself?" "What was the insurance on the house?" To the last question the accused answered $200, and to each of the others he gave a negative answer. The court frequently cautioned him that he need not make answer to any question that would tend to incriminate him.

It is argued in support of the conduct of the trial at this point, that on cross-examination the previous life and character of the witness, especially when he is a party, may be inquired into to such an extent as in the sound judgment of the trial court may seem proper. Such is undoubtedly the settled rule, and it is resorted to generally where the person accused of crime offers himself as a witness in his own behalf. There is no rule by which the exercise of that discretionary power of the court can be guarded with exactness. The range is necessarily broad in order to fit the facts of particular cases, but there is a limit beyond which it cannot go. That limit is clearly reached and passed when questions are asked, manifestly, for the mere purpose of creating prejudice in the minds of the jurors, or the examination is carried on to such an extent and in such a manner as to become oppressive, and is not warranted by anything in the case. Questions as to previous convictions of criminal offenses, or serving terms in prison or in jail from which convictions will be presumed, are uniformly permitted when the instances are not too remote, upon the theory that a person



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of that character will not be as likely to testify truthfully as a man whose life has not been thus blackened. Our statute (sec. 4073, Stats. 1898) expressly allows that kind of cross-examination. Questions relating to mere criminal charges, or acts which might be the foundation for criminal prosecutions, are usually rejected. They should not be permitted unless there are circumstances in the case suggesting that justice will or may be promoted thereby. It would be a clear abuse of judicial discretion to permit such questions where the indications are plain that the purpose is not to bring out the truth in regard to the witness's life and character, and to thereby discredit his testimony, but for the purpose of discrediting the witness regardless of whether there is any warrant for the questions or not, and if he be a party, in that way to influence the minds of the jurors into a verdict against him.

The administration of justice requires that trial courts shall not have their discretionary powers circumscribed by any very narrow boundaries, but does require that such limit shall be placed upon them as will prevent any mere prejudice to be built up in the course of a trial, especially in an important case like this, which will tend to influence a jury to determine the facts otherwise than from the legitimate evidence produced in court. It seems clear that such limit was passed in allowing the cross-examination in question, to the extent to which it was carried. It is one thing to honestly ask questions on cross-examination for the purpose of discrediting a witness, and quite another to ask questions of a witness who is a party, especially in a serious criminal case, for the purpose of injuring his cause in the eyes of the jury, and leading them to believe he was likely, because of his bad character, to have committed the offense charged. A reading of the questions under consideration leads to the irresistible conclusion that no idea was entertained by the cross-examiner that proof would be elicited of the matters

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implied by them. We say "implied" because the asking of the direct questions in the manner in which they were asked implied to some degree that the examiner was possessed of information upon which the questions were based, and although the answers were in the negative, the bad effect of the insinuations thrown out by the questions was not and could not have been removed entirely from the minds of the jurors. It is useless to refer to authorities on this subject. Text writers and adjudged cases are generally in accord that, so long as the cross-examination is carried on with reasonable fairness, to test the credibility of the witness, it is permissible, but the moment questions are asked concerning facts touching the witness's character, which are irrelevant to the facts in issue, for any other purpose than to affect his credibility or which manifestly do not bear on the subject of credibility, the right of cross-examination is abused, and on objection should be restrained within legitimate limits. Whart. Crim. Ev. §§ 473, 477, and notes.

The general rule, that the previous life and character of a witness can be inquired into, must be preserved, and the broad discretionary power of trial courts in administering such rule fully recognized. The trouble here is that the cross-examination was allowed to be carried on manifestly without any reason except to create prejudice against the accused in the minds of the jurors. It was well calculated to have that effect and to bear materially on the ultimate result, especially since the whole case rested on circumstantial evidence. It is clearly reversible error that cannot be overlooked without lowering the standard of justice which it is the duty of the court to rigorously maintain.

The accused endeavored to account in part for the change in his financial condition, which the evidence tended to show manifested itself soon after the disappearance of Nelson, by proving that he made a horse-doctoring trip with Nelson in the spring of 1896 and realized therefrom about $200. To

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throw discredit on the testimony of the accused in that regard, the prosecution offered in evidence a memorandum book containing some writing on a few pages, which was testified to as being in the handwriting of Nelson. That evidence was received against objection, the court remarking, in substance, that it tended to contradict the testimony of the accused. On one page, under date of April 30, 1896, are several entries of debit and credit items, relating to traveling expense, but with nothing to show any connection of *Buel* therewith, or any one other than the person who made the memoranda. On one page, under date of October 24th, the year not being stated, and the words "E. M. Buel, cash received" being written at the top of the page, are several entries aggregating $25.75. On one page, under date of May, 1896, there is one entry of a debit and a credit item, no name appearing or indication of what the entries refer to. On one page, under date of April 30, 1896, are several entries referring, apparently, to the cost of a span of horses, set of harness, wagon, and some small articles. On another page, under date of April 30, 1896, entitled "Medicine Bill," are several entries of debit and credit, with a balance brought down. All entries but two, other than those made in October of an unknown year, were made at one time, and there is nothing to indicate that *Buel* had any connection with them or with the book, and there is no evidence that he ever saw or knew of it, or to show, except by mere surmise, that the entries had any relation to any business transactions between Nelson and *Buel*, except those which refer to a date long before the horse-doctoring trip. Upon what principle the book was admitted in evidence as tending to impeach the evidence of *Buel*, is not discoverable. It had no such effect, legitimately. It received that effect merely by the suggestion of the court that it tended that way. The book was, at most, only a private memorandum book of Nelson, containing unintelligible entries so far as relate to any circumstance

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bearing on this case. The receipt of it by the court as impeaching evidence on one of the material though possibly not necessary evidentiary circumstances in the case, that is, the financial circumstances of the accused after the disappearance of Nelson, was highly prejudicial.

The court refused to allow proof of declarations of third persons containing threats against Nelson. If that evidence was offered for the purpose of showing motive for Nelson's leaving the county, it was immaterial, in the absence of anything to show that the threats were communicated to Nelson. Again, the motive that moved Nelson to go away was fully established to be fear of the Wettenhall prosecution, and there was no dispute on that question. If the evidence was offered for the purpose of creating an inference that some one other than *Buel* was guilty of the homicide, the evidence was clearly inadmissible. Wharton, Crim. Ev. § 225, and note; Jones, Ev. § 300; *State v. Haynes*, 71 N. C. 79; *State v. Weaver*, 57 Iowa, 730. It was properly rejected on any theory.

Evidence was rejected regarding statements made by *Buel* to third persons before the commission of the offense, as to his intention to buy a farm. The evidence was directed to a time so near the homicide that it was properly rejected as self-serving declarations. It was also properly rejected upon the ground of being pure hearsay. *McKinnon v. Meston*, 104 Mich. 642. Again, proof of a mere purpose to buy a farm some time after the homicide, would have had such a very remote bearing, if any, on the evidentiary circumstance of the sudden change in the final circumstances of the accused, that it was properly rejected on that ground. It may be freely admitted that proof of declarations to establish the fact of intent is admissible in a proper case. *Mut. L. Ins. Co. v. Hillmon*, 145 U. S. 285; *Insurance Co. v. Mosley*, 8 Wall. 397. But the offer in question does not come within the rule in that regard or of any of the exceptions to the general rule against hearsay evidence.

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The court was specially requested to instruct the jury that before finding the defendant guilty of any crime they should require equally as strong and conclusive evidence of his guilt as would be required by them as careful and prudent men to enter upon the greatest and most important acts of their lives. The request embodied, substantially, a correct rule of law, which the accused was entitled to have given to the jury, and unless the general charge sufficiently covered it the refusal to grant the request was reversible error.

There are cases in the books of reversals because of erroneous instructions given on the line under consideration. *Anderson v. State*, 41 Wis. 430; *Emery v. State*, 92 Wis. 146. But so far as we know, the failure to instruct at all in that regard, where the jury were fully instructed otherwise on the subject of reasonable doubt, has never been held reversible error or seriously criticised.

The use of such expressions as, "the jury before convicting an accused person should be convinced of his guilt with that degree of certainty requisite to lead men to act in the most important affairs of life," or "in considering the evidence and coming to a conclusion, the jury should exercise all the care, caution, and judgment that men exercise in the most important affairs of life," or the jury "should be convinced only by the same proof as that which would convince men and upon which they would act in the management of the gravest and most important matters, and in arranging the most serious affairs and concerns of life," or the jury "should not convict unless from the whole evidence in the case they have an abiding conviction to a moral certainty that the accused is guilty," are each and all mere explanatory expressions to convey to the minds of jurors the exact meaning of the term "beyond a reasonable doubt" and the degree of certainty which such term calls for. They are generally given as the equivalent of the general expression that, "in order to convict, the jury should be convinced of the guilt of the accused beyond a reasonable

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doubt." The latter expression contains all there is of the rule, and it was given to the jury in this case with commendable fullness. This may be said without expressing an approval of the charge on the subject as a model for clearness. The general instructions on such subject, found in the different portions of the charge, are as follows: "A jury is never authorized to convict a man of crime until the presumption of innocence is overcome by credible evidence." "You will not convict the defendant unless you are satisfied from the whole evidence that the defendant, *Eugene Buel*, wilfully, feloniously, and with malice aforethought, or with premeditated design to effect the death of Peter F. Nelson, killed and murdered him at the time and place alleged in the information. *If each and all of you are satisfied that each and every material thing* set out in the information is true and has been proved by the evidence beyond every reasonable doubt, you will convict; if you are not so satisfied you will acquit." "The defendant's guilt must be established by the evidence to the exclusion of every other reasonable hypothesis." "If a reasonable doubt exists in your minds of defendant's guilt of any material allegation set out in the information, your verdict will be not guilty. A reasonable doubt, or doubt to be of avail to this defendant, is a doubt founded upon reason." "The state is not bound to prove, in a criminal case, a defendant's guilt beyond all possibilities, beyond all conjectures; for possibilities, conjectures, doubts, will arise in most any, if not all, criminal cases." In view of such full instructions, the question is, Was it error for the court to refuse to give the explanatory instruction requested?

To say that a failure to explain the meaning of the phrase "beyond a reasonable doubt" is reversible error, is a doctrine that has but very little support in the books. Much discussion is found in the adjudged cases as to whether any attempt to explain it does not tend to confuse rather than

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to enlighten the jury. It is said that scholastic attempts to explain the meaning of such words, which are more easily understood than explained, are liable to lead such men as commonly make up our juries to think that the ordinary processes of reasoning, by which they are accustomed to come to conclusions in the ordinary affairs of life, are not suitable to the jury room in a criminal case, but that some other process of reasoning is to be adopted which they are to gather from the language of the trial judge, and that they are thereby really weakened in their ability to come to a just conclusion; that it would be better to leave them to exercise their own intelligence in regard to language so plain that it is not easy to make it plainer by explanation. Mr. Justice NEWMAN said, in *Hoffman v. State*, 97 Wis. 576: "It needs be a skilful definer who will make the meaning of the term [beyond a reasonable doubt] more clear by the multiplication of words," while the writer expressed the view in *Emery v. State*, 101 Wis. 627, that the due administration of justice in many cases requires a careful explanation of the term to be given to the jury, and that without it justice is liable at times, through ignorance, to be defeated, and the efficacy of the law to protect society, and its administration by courts, discredited. In *State v. Sauer*, 38 Minn. 438, MITCHELL, J., expressed the opinion that 'most attempts at explaining the meaning of a "reasonable doubt" are made by the use of expressions that themselves need explanation more than the term sought to be explained by them, and that the better way is to omit such attempts, but that if such attempts be indulged in it would be better to adopt those definitions that have received general approval by courts.' In *People v. Stubenvoll*, 62 Mich. 329, CHAMPLIN, J., speaking for all the members of the court, said: "We do not think that the phrase 'reasonable doubt' is of such unknown or uncommon signification that an exposition by the trial judge is called for. Language that is within the comprehension

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of persons of ordinary intelligence can seldom be made plainer by further defining or refining. All persons who possess the qualifications for jurors know that a doubt of the guilt of the accused, honestly entertained, is a reasonable doubt." In Judge Thompson's work on Trials (vol. 2, § 2463), it is said that "all the definitions are little more than metaphysical paraphrases of an expression invented by the common-law judges for the very reason that it was capable of being understood and applied by men in the jury box." Many more instances might be given where judges of appellate courts and text writers have discouraged all attempts at explanation of what is a reasonable doubt, from the standpoint of a juror. Nevertheless the fact remains that trial judges, at least in important criminal trials, generally take great pains to explain the term so that the commonest understanding can grasp its meaning. The practice in that regard has grown up from frequent observations of the necessity of it. It is considered here that it is proper in all cases to make a careful explanation of the term, and that where the prosecution relies wholly on circumstantial evidence it is the better practice to do so, taking the utmost care, however, to use only expressions that have been approved, particularly by this court. No better illustration that the term is not as easily understood as suggested in some of the cases referred to, or of the care that should be exercised in explaining it, need be given than the failure of Mr. Justice CHAMPLIN to correctly explain the term after declaring that no explanation was needed. He stated that all persons qualified as jurors know that an honest doubt is a reasonable doubt. In the first place it is by no means certain that all jurors will be intellectually qualified for their duties without instruction; and again, clearly, every honest doubt is by no means a reasonable doubt. A doubt, however honest, may be, and often is, very unreasonable. From the standpoint of a juror, in considering a case on the evidence, a

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doubt however honest is not reasonable unless based on reason and common sense as applied to such evidence. It is considered that, in this case, the better practice would have been to have given to the jury the explanatory instruction requested, but inasmuch as the subject was covered by clear language in the general charge, the refusal was not reversible error. *State v. Martin*, 30 Wis. 216; *Allen v. U. S.* 164 U. S. 492; *Harris v. U. S.* 8 App. Cas. (D. C.), 20; *Stevens v. Comm.* (Ky.), 45 S. W. Rep. 76; *Taylor v. State* (Tex. Cr. App.), 42 S. W. Rep. 285; *Johnson v. State* (Tex. Cr. App.), 45 S. W. Rep. 901; *State v. Hamilton*, 57 Iowa, 596; *State v. Ruthven*, 58 Iowa, 121; *Comstock v. State*, 14 Neb. 205; *State v. Hayden*, 45 Iowa, 11; *State v. Glass*, 5 Oreg. 73.

The following instructions were requested and refused:

"(1) If you have a reasonable doubt as to these being the remains of Peter F. Nelson, or if you have a reasonable doubt as to whether the deceased came to his death at the hand of the defendant, then, and in each case, it is your duty to acquit.

"(2) The fact that the crime has been committed and the fact that this defendant committed that crime, must be proved independently of each other and beyond a reasonable doubt; and circumstances not tending to prove the commission of the crime, but tending to prove the guilt of the defendant, provided the crime has been committed, cannot be considered by the jury in considering whether or not the deceased came to his death through criminal means.

"(3) If the jurors believe that the evidence upon any essential point in the case admits of the slightest doubt consistent with reason, the defendant is entitled to the benefit of the doubt and should be acquitted."

Also, in substance: The law presumes the accused to be innocent until his guilt is established by the evidence beyond a reasonable doubt, to the satisfaction of each and every one of the jurors. The presumption of innocence should be

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acted upon by you throughout the whole trial unless so overcome by evidence as to show the guilt of the defendant beyond a reasonable doubt. You cannot legally convict upon the preponderance of evidence or upon suspicion, however strong, or by any matter outside of the evidence produced in court.

It is sufficient to say as to each of the requests mentioned that it was covered by the general charge. In order to have carried home to the minds of the jurors with greater distinctness the full sense of the general expressions used regarding the term "reasonable doubt," and the "presumption of innocence," considering the gravity of the case and the nature of the evidence upon which it rested, it would have been a better administration of justice to have given some, at least, of the instructions requested, particularly 1 and 2. It is always best in the trial of so serious a case as this, where all there is of value in life is at stake on the one hand, and the most important interests of the people as a whole are at stake on the other, when an instruction is requested covering a vital question in the case, which in the judgment of the attorneys representing the accused person will more fully convey to the minds of the jurors a correct rule of law in regard to such question, and which is clearly more specific, than that of the general charge, to either embody it in such charge or to give it sepearately; but a failure to do so, when such charge is full upon such question, in language reasonably clear to men of ordinary comprehension, cannot be considered reversible error. Here the jury were told that the accused was not called upon to prove his innocence, but that the state was required to prove his guilt beyond a reasonable doubt, and that each and all of the jurors, before rendering a verdict of guilty, were required to come to a conclusion from the evidence produced in court in accordance therewith beyond a reasonable doubt, and as to each and every material thing set out in the in-

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formation, and that guilt was established by such evidence to the exclusion of every other reasonable hypothesis, and that they were required to be unanimous in their final conclusion in that regard when rendering a verdict of guilty, and not to so conclude until the presumption of innocence in favor of the accused was overcome to their satisfaction by credible evidence, with the degree and certainty mentioned. Such instructions must have conveyed, reasonably, to the minds of the jurors all that was sought by the requests rejected. It would have been well to have told the jury that the charge contained in the information included, first, the death of a human being, second, that the death was produced by criminal means, third, that the person supposed to have been murdered was Peter F. Nelson, fourth, that the accused was the guilty party, and that each fact was required to be established independently of any other fact, and that each and all of them, and every evidentiary fact necessary to the existence of either of them, should be established beyond a reasonable doubt and so as to exclude to a moral certainty, or beyond a reasonable doubt, every reasonable hypothesis inconsistent therewith (*Kollock v. State*, 88 Wis. 663), in order to justify a conviction; and that it was the duty of the jurors to base their conclusion as to each of such facts on the evidence and the evidence alone produced on the trial tending to establish it. It is by no means clear but that instructions along that line would have been more clearly understood by the jury than the general statement that it was essential to a conviction that the state should establish by the evidence each and every material thing set out in the information beyond a reasonable doubt and so as to exclude every reasonable hypothesis inconsistent with guilt. But it is not possible for the jury to have acted in this case upon any other theory than that they were required to find, in order to convict, that the remains found were those of a human being, that he came to

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his death by a criminal means, that such human being was Peter F. Nelson, and that plaintiff in error was the guilty party, and that those facts were all "matters contained in the information."

The court instructed the jury as follows: "The state has offered in evidence certain alleged facts and circumstances tending to contradict or explain the evidence of defendant, as follows: That the defendant has not proven that the shoes and pantaloons said to have been found with the remains were not the property of said Nelson; that the defendant's testimony as to several material matters," mentioning them, "has not been corroborated." We must admit that we are unable to discover what was in the judicial mind in giving such instructions, and no help in that field has been furnished by the learned attorney general. We have read the language of the trial judge, and re-read it, and the more study put upon it the more obscure the meaning of the language has become. "The state has offered in evidence certain alleged facts and circumstances tending to explain or contradict the evidence of the defendant; that the defendant has not proven that the shoes and pantaloons said to have been found with the said remains were not the property of the said Nelson." We will not attempt to explain or discover what idea such language was intended to convey, or that of the other language to which we have referred in the same connection. The expressions seem to be misleading and inaccurate throughout. The only way they could be passed over as not prejudicial would be to hold that the meaning, whatever was intended, is so obscured that neither it nor any other is likely to have been conveyed to the minds of the jurors, and to support that view there is much reason. But it is more likely that the jury may have received the impression that the burden of proof, by reason of some positive evidence of identification of the shoes and pantaloons, was cast upon the defendant and that he was required to prove that they were not the property of Nelson, and that the testimony of the ac-

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cused on the various other matters mentioned was not to be taken as true unless corroborated. In that view the instructions were erroneous and prejudicial in a high degree. Obviously, the burden of proof was not at any point in the case shifted from the state to the accused. It rested on the prosecution from the beginning to the end of the trial, and if, taking the evidence of the accused, whether corroborated or not, with all the other evidence produced, whether bearing on a fact in issue or an evidentiary fact sought to be established, a reasonable doubt was left in the minds of the jurors as to its existence, it was the duty of the jury to resolve that doubt in favor of the accused.

Further instructions were excepted to on the ground that they contained misstatements of the evidence and assumed the existence of facts which were in dispute, none of which exceptions seem to be sustained by the record. It is said that the court improperly told the jury that no one but Pugh, the banker, and *Buel* knew that Nelson had the money in his possession, because a policeman went to the bank with Pugh when he took the money from the vault. The record shows that Nelson remained in Pugh's house while the latter went to the bank accompanied by *Buel* and a policeman whose services were secured for that purpose, but that after the money was taken from the bank Pugh and *Buel* returned to Pugh's house; that the policeman did not accompany them back, and that when the money was paid over to Nelson only he, Pugh, and *Buel* were present. It is further said that the court instructed the jury that Nelson did not leave the country immediately after receiving the money. The record shows, however, that what the court said was that evidence had been produced tending to show that instead of Nelson leaving the country immediately after obtaining the money, according to his expressed intention to the banker who paid it to him, he went into the country. That was true according to the undisputed evidence.

There are some other matters of which complaint is made,

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but none that appears to be of importance except this: At the close of the evidence the court directed the attention of the jury to a particular part of the evidence, and said: "*It is perhaps hearsay, and that and all other evidence of a hearsay character, whether objected to or not, is now stricken from the record and the jury are directed to disregard it.*" That is called to our attention as a cause for reversal, but it does not appear that any exception was saved in regard to it. That it was error of a most serious character seems plain, though it is not a cause for reversal because a proper exception was not taken. Since the case must go back for a new trial it is deemed proper to refer to the matter so that such an error may not occur again. If there had been a jury of lawyers in the box they could not have complied with the judge's direction with unanimity. What is hearsay and what is not hearsay is not always easily determinable. Again, not all hearsay is inadmissible as evidence. Such a sweeping direction given to the jury, leaving them to determine what evidence to reject, is without precedent probably in the history of judicial trials reported in the books. If any such a proceeding were sustainable, the trial court could admit any kind of evidence and then clear the record at the close of the trial by a general order striking out all the evidence that was subject to objection by either party for any cause and a general direction to the jury to consider what was left. That practice would obviously save trial judges much mental labor and anxiety, but the administration of justice would be sadly defective.

It is considered that we have now referred to each of the numerous matters brought to our attention by the plaintiff in error that is material or that will be liable to arise on another trial. The conclusion is reached that because of the errors committed, to which we have referred, injustice has been done the plaintiff in error, and that the judgment must be reversed. A person circumstanced as the plaintiff

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in error was is entitled to a fair trial according to the law of the land and the settled practice of the courts. That is the right of every person accused of crime and it should be awarded with the utmost strictness in a case of this importance. That right is just as sacred and to be just as fully guarded in one case as in another, no regard being had to the importance or significance of the accused as a member of society.

*By the Court.*—The judgment of the circuit court for Sawyer county is reversed, and the cause is remanded to such court for a new trial, for which purpose the warden of the state prison is directed to deliver the plaintiff in error, *Eugene Buel*, to the sheriff of such county, who is directed to safely keep the said *Buel* in his custody until discharged therefrom or as otherwise ordered according to law.

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## Hubbard, Administrator, Appellant, vs. Chicago & Northwestern Railway Company, Respondent.

*September 7 — October 20, 1899.*

*Estates of decedents: Assets: Negligence causing death: Action for benefit of children: Commencement after final settlement: Administrator* de bonis non: *Notice: Waiver: Guardian* ad litem.

1. The right of action under secs. 4255, 4256, Stats. 1898 (providing that where the death of a person is caused by the negligence of another the wrongdoer may be held liable in an action brought in the name of the personal representatives of the deceased, and the amount recovered shall "belong and be paid over to his . . . lineal descendants"), constitutes no part of the estate of the deceased, and is not taken away by the failure or refusal of the administrator to commence suit before final settlement.
2. The appointment of an administrator *de bonis non* of an intestate estate without any notice being given as required by sec. 3808, Stats. 1898, and without the appointment of a guardian *ad litem*

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for minor heirs, is invalid even though the application for the appointment of such administrator was made by the general guardian of such minors.

3. An order of the county court, made more than sixteen months after the appointment of such administrator, allowing a guardian *ad litem* to file an appearance on behalf of the minors *nunc pro tunc* as of the date of such appointment did not validate the appointment.

4. The functions of a guardian *ad litem* appointed to represent infants in the general administration of an estate in the county court terminate with the final settlement of the estate, unless continued by order of the county court.

APPEAL from a judgment of the circuit court for Manitowoc county: JOHN GOODLAND, Judge. *Affirmed.*

For the appellant there was a brief signed by *G. G. & C. H. Sedgwick*, and oral argument by *A. J. Schmitz* and *G. G. Sedgwick.*

For the respondent there was a brief by *Fish, Cary, Upham & Black*, attorneys, and *Edward M. Hyzer*, of counsel, and oral argument by *John T. Fish.*

CASSODAY, C. J. This action was commenced September 28, 1897, by the service of a summons. The complaint alleges, in effect, that the plaintiff's intestate was killed instantly, by the gross negligence of the defendant, October 3, 1895; that he left five minor children, whose ages ranged from nine to nineteen years, but no widow; and that the plaintiff was appointed such administrator September 28, 1897.

The defendant answered by way of plea in abatement to the effect that the deceased left, him surviving, five minor children, but no widow, as stated; that upon the petition of the brother of the deceased to the county court, filed October 8, 1895, and after due notice thereof, and upon proper hearing thereon, and after the proper appointment of G. G. Sedgwick as guardian *ad litem* of the minor children of the



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deceased, C. J. Gilbert was, by an order of the county court, duly appointed administrator of the estate of the deceased, November 5, 1895; that upon the same day he filed his proper bond, and letters of administration were to him duly issued; that thereafter C. J. Gilbert duly administered that estate, and filed his final account of such administration and his petition for its examination and allowance November 25, 1896, and that December 29, 1896, the county court made and filed its findings of fact and conclusions of law, whereby, among other things, such final account was examined and allowed and it was ordered that, upon the filing of certain receipts therein mentioned, said administrator should be finally and forever discharged from his trust and from all liability on account thereof, and that judgment in accordance with such findings and conclusions should be entered; that September 27, 1897, the county court made and filed its order reciting such facts, and entered such order or judgment forever discharging Gilbert as such administrator from such trust and from all liability on account thereof; that September 25, 1897, one Loten, who had been appointed general guardian for such infants August 22, 1896, resigned such guardianship, and Albert L. Hougen was appointed such general guardian in his place, and that such appointment was made without legal notice thereof, and without the necessary petition and consent thereto by or on behalf of such infants; that September 28, 1897, an unverified petition was made and filed by said Hougen, alleging that said estate had not been fully administered and that there still remained uncollected, as an asset of the estate, a claim against the defendant herein, valued at $1,000, for negligently causing such death, and praying for the appointment of *Harvey F. Hubbard* as administrator *de bonis non* of such estate; that upon the same day the county court made its order appointing *Hubbard* to be administrator *de bonis non*, and authorized and directed him to bring this action; that *Hubbard*

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thereupon filed his bond, and letters of administration were in form granted to him upon the same day, but that no notice whatever of the time and place of hearing and action upon such petition of Hougen was given, by publication or otherwise, to any of the parties interested therein; that such order was made wholly without jurisdiction or authority; that the plaintiff commenced this action on the same day, without any other or different appointment; that no guardian *ad litem* was ever appointed after such final settlement, September 27, 1897, except that February 19, 1899, the said Sedgwick, who had been duly appointed as the guardian *ad litem* of the minor children November 5, 1895, filed in the county court his verified statement to the effect that September 28, 1897, he appeared before the court as such guardian *ad litem* in behalf of such infants, and asked the court to appoint *Hubbard* as such administrator of the estate, and to enter an order thereon permitting his appearance formally *nunc pro tunc* as of September 28, 1897; that February 20, 1899, the county court ordered that such appearance be, and the same was thereby, directed to be filed in that court *nunc pro tunc* as of September 28, 1897.

The trial court found, in effect, that the facts were as so alleged in the plea in abatement; that no guardian *ad litem* was appointed by the county court upon the hearing of such petition September 28, 1897; that Sedgwick was attorney for the petitioner, and that no appearance was entered for or by any guardian *ad litem* on such hearing; that no notice of any kind was given, by service or publication, or in any other manner, of the hearing of said matter; that September 28, 1897, the plaintiff was appointed as such administrator, without notice. And as conclusions of law the court found, in effect, that such appointment was without authority, and invalid as to the minor children and as to this defendant; that the plaintiff in this action has not the capacity to bring the same as administrator of the estate of

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the deceased; that the plea in abatement was sustained; that this action should be dismissed; that the defendant was entitled to judgment dismissing this action and for its costs and disbursements; that judgment be entered in accordance with such findings and conclusions.

From the judgment so entered the plaintiff appeals.

The complaint alleges that Andrew T. Weblin was instantly killed by the defendant's gross negligence. This being so, the defendant can only be held liable in an action "brought by and in the name of" his "personal representative," "and the amount recovered," if any, will "belong and be paid over to" his "lineal descendants;" that is to say, his children mentioned in the complaint. Stats. 1898, secs. 4255, 4256; *Brown v. C. & N. W. R. Co.* 102 Wis. 137. The right of action, therefore, is purely statutory, and in this case is given solely for the benefit of such children. *Id.* Such right of action so given for the benefit of the children constituted no part of Andrew T. Weblin's estate, and hence the final settlement of that estate September 27, 1897, cannot operate as a bar to their right of action by and in the name of a personal representative appointed in the manner prescribed by statute. Of course, the action might have been brought by C. J. Gilbert, as the administrator of the intestate's estate, but his refusal or failure to bring the action did not take away the right thus given to the children to have such action prosecuted in the name of such personal representative. Our statutes are unlike the statutes of Michigan, and hence the decisions in that state, cited, are not applicable here.

The question recurs whether the appointment of the plaintiff as such administrator *de bonis non* is valid. The statute provides that, "When application shall be made to any county court for the appointment of an administrator on an intestate estate . . . such court shall appoint a time and place for hearing such application, and shall cause no-

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tice thereof to be given, by personal service on all persons interested, at least ten days before the day designated, or by publication in a newspaper as provided in section 4045, at least three weeks successively previous to the time appointed; and no general administrator shall be appointed without such notice. Sec. 3808. As indicated, no such notice was given, by publication or otherwise. All parties interested were entitled to such notice and a hearing. At the time the plaintiff was so appointed administrator, at least four, if not all five, of such children were under age. They did not and could not waive their right to such notice and hearing, and no one at the time had authority to represent them or waive such right to notice and hearing for them. No guardian *ad litem* was appointed to represent such children in this action. Such an appointment was essential in order to bind the infant heirs. *O'Dell v. Rogers*, 44 Wis. 136. True, the application for the appointment of the plaintiff was made by their general guardian, appointed on the resignation of their former general guardian. Sec. 3969, Stats. 1898. But he could not, as to such children or the defendant, waive the notice required by the section of the statute quoted. Sec. 3808. True, a guardian *ad litem* was appointed November 5, 1895, to represent the infants in the general administration of the estate; but his functions as such guardian *ad litem* terminated with the final settlement of that estate September 27, 1897. Sec. 4052*a*, Stats. 1898; County Court Rule III. His appointment might have been continued by order of the county court, but was not. *Id.* Had he been so continued by order, and appeared in the county court at the time of the plaintiff's appointment as administrator, then the county judge was required to make an entry in his minutes of such appearance, and proceed no further without such appearance being so entered. Sec. 4052*a*, Stats. 1898. But there was no such appearance, and, of course, no such entry. The order of the county

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court made February 20, 1899,— more than sixteen months after the commencement of this action,— allowing Sedgwick, as such guardian *ad litem*, to appear *nunc pro tunc* as of September 28, 1897, when the plaintiff was so appointed administrator, is without significance. Certainly it did not cure the want of notice required by sec. 3808, Stats. 1898. Nor could it operate to give vitality to this action, which had been commenced sixteen months before without authority.

*By the Court.*— The judgment of the circuit court is affirmed.

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KERRIGAN, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

*September 9 — October 20, 1899.*

*Railroads: Injury to fireman: Contributory negligence: Assumption of risk: Notice of defect.*

1. In an action against a railroad company for injuries sustained by a fireman by being thrown from a moving engine while attending to the headlight by reason of a defective step, the evidence (showing, among other things, plaintiff's previous knowledge of the defect and that it was not necessary for him to use the step at the time of his injury) is *held* to show contributory negligence.
2. It being undisputed that reports of such defects were to be made or notice thereof given to the roundhouse foreman, the fact that plaintiff had requested a boiler repairer to fix the defective step and that the latter did or attempted to do so, did not relieve plaintiff from an assumption of the risk.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Losey & Woodward*, attorneys, and *H. H. Field*, of counsel, and oral argument by *Mr. Field* and *Mr. G. M. Woodward.*

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For the respondent there was a brief by *Jos. F. Cuddy*, attorney, and *C. L. Hood*, of counsel, and oral argument by *Mr. Cuddy*.

CASSODAY, C. J. This is an action for damages sustained by the plaintiff while in the employ of the defendant as fireman on engine No. 190, running between La Crosse and Austin, Minnesota, on the evening of February 19, 1897, at Grand Meadow, Minnesota, by reason of a defective step on the front end of the engine. Issue being joined and trial had, the jury returned a verdict in favor of the plaintiff, and assessed his damages at $7,500; and from the judgment entered thereon the defendant brings this appeal.

It is said by the plaintiff's counsel, in effect, that the step consisted of an upright shaft about thirteen inches long, with a circular disc about five and one-half inches in diameter at the upper end, and a shoulder at the lower end, terminating in a stem two inches long and seven eighths of an inch in diameter, provided with a thread extending the entire length thereof, and a seven-eighth-inch nut; that this stem was inserted into and extended through a hole of corresponding size in a sheet-iron deck three sixteenths of an inch in thickness, covering the pilot frame; that there was a washer laid over the hole, on top of the deck and under the shoulder of the shaft, and the stem was fastened on the under side of the deck with the washer below by a nut screwed onto the stem, which, when turned up tight, held the stem firmly in place; that this step had been on the engine a number of years, and was for the use of the fireman in attending the headlight of the engine.

The plaintiff had been fireman on that engine, of which James McLindon was the engineer, for three years prior to the accident, and he testified, as to his familiarity with the step and the manner in which the accident occurred, to the effect that he was at the time of the accident thirty-three

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years of age; that his attention was first called to the loose condition of the step five, six, or seven months before he was hurt, at the Austin roundhouse; that in doing his work around the engine he found the step loose; that the truckman was putting in a pair of trucks, and he was talking with him, and saw that the step was loose, and had him tighten it up; that the next time the engineer found it loose, February 17, 1897, at Houston, Minnesota; that when they got to Rushford he took the step off, and put it on the corner of the tank, and brought it to Austin; that he then reported it, and had it fixed; that he had seen the paper shown him, and in evidence, on the hook in the roundhouse at Austin at the boiler-makers' work bench, and which paper reads as follows: "Report of engine 190. After careful inspection on arrival at Austin, 11:55 a. m., 2—17. Engine in good condition with following exception: Fasten step on front end. Thread is stripped. McLindon, Engineer." Indorsed on back: "Repaired at Austin."

He further testified that the next notice he had that the step was loose was the next morning, in the roundhouse at North La Crosse, February 18, 1897,—the day before he was hurt; that he laid his hand on the step and found it was loose; that he took the wrench, and tightened it up; that he called the attention of the engineer, McLindon, and the roundhouse foreman to it; that the foreman's business was to see that all work reported was done; that he had charge of everything in the roundhouse,—general repairs; that the roundhouse foreman said the step was dangerous in that condition; that he wanted them to either fix it or put in a new one; that he did not fix it; that the plaintiff went and got a wrench and tightened it up; that he next noticed that the step was loose on their outward trip the next day, in the forenoon of February 19, 1897; that he then noticed the step was loose as they were going into the station at Wykoff, about seventy-three miles west of La Crosse, and thirty-nine

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miles east of Austin; that it was about 10:55 a. m. when they arrived at Wykoff; that as they were going into the station he was sitting on his seat and ringing the bell; that he saw that the step was wobbling back and forth; that he told the engineer that the step was loose again; that the engineer told him to go and take it off, and throw it onto the tank, the same as he had done on the previous trip, but that he did not do it; that he thought it was just as well up there, as he would not have to use the step at all until he got to Austin; that that was in the daytime; that that was where the step belonged; that there was no more reason for the step remaining on there than on the previous time when the engineer took it off; that it might as well be on the tank as on the pilot; that the engineer told him to take it off, but that he did not take it off, but did go out and tighten it, instead of taking it off as the engineer had told him; that he went and tightened it up again with his wrench; that the nut was still on; that when he spoke of the step as having got loose at these different times he meant simply that the nut worked off, so that it did not hold tight against the plate; that all he had to do was to put the wrench on it, and tighten it up; that the next he observed anything with reference to the step was when they got to Austin, on February 19th; that he guessed the engineer knew that he did not take it off; that the engineer would assume that he (the plaintiff) had taken it off, as he had told him to do so; that, after they got to Austin, he got a wrench himself, off the engine, as Myers had requested, and held the step while Myers took off the nut; that the nut was still on, and there was one or more washers on below the deck plate and one above; that he did not take the step out of the hole; that it remained in a standing position; that he did not know what Myers did, but when he came back he had the washers in his hand; that the plaintiff held on to that round piece while Myers started the nut on; that he stayed and held it

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while Myers went for more washers, and put some of them on, and that he held it while Myers tightened it; that he did not take it out of the hole at all; that there was nothing he did to the top of it; that the large washer was still on the top; that Myers said he put a jamb nut on,—half a nut; that he did not see him have the jamb nut in his hand; that a jamb nut is one you put on below the original nut, to make it tight,—to lock to, like that; that he did not stay there until Myers finished fixing it; that Myers told him he had tightened it afterwards,—that it would hold; that that was the last time he saw anything done to the step until he was injured; that that was about 4 o'clock in the afternoon of the same day; that he had no occasion to use the step from Wykoff to Austin.

The plaintiff further testified that when they got to Austin he found the step was loose again; that, after the engine was put in the roundhouse, he met Myers, and asked him if he was going to fix the step; that he said he would; that he reported the condition of the step to Myers; that he did that on his own motion,—that no one told him to do it; that Brenaman was roundhouse foreman; that Myers worked in the boiler department, to do the running repairs in the boiler department; that Myers repaired that step that day, when he reported it to him; that it was about 4 o'clock p. m.; that he did not see what Myers did in the repair of the step, but knew what he told him that he did; that he said at the time that he got it tightened up; that he was there when Myers started to put on the step; that he held the step while Myers started to turn the nut on; that the plaintiff was then around and about the engine, part of the time in sight; that after Myers finished it he told plaintiff what he had done; that the plaintiff was then standing right by the side of him; that he put the engine in the roundhouse, and on the evening of February 19, 1897, at 7 or 7:15 p. m., at Austin, he took the engine out of the roundhouse; that the step then

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appeared to be all right and solid; that it was solid; that he had occasion to use it when he took the engine out of the roundhouse; that he stepped on it, and lit the headlight; that he stepped on it once afterwards and before the accident at Great Western crossing,— the headlight was burning too high; that that was eighteen or nineteen miles from Grand Meadow, the place of the accident; that when he fixed it they had not come to a full stop; that he went out, and turned it down a little, but by the time he got it turned down the engine stopped; that when they pulled into Grand Meadow, on the evening of the accident, the headlight was burning very low; that they could not see the rail ahead; that he called the engineer's attention to it before they got into Grand Meadow, and said to the engineer, "When we stop at Grand Meadow, I guess I had better turn up the light a little," and he said, "Yes;" that when he went out to fix it they could not have been going over five or six miles an hour; that he sat on his seat, and rang the bell, until after they had passed the depot door, and opened his cab window, and went out along the running board; that the engine ran about 150 or 175 feet beyond the depot door; that he went out as quick as he could conveniently, along the running board, and put his right foot onto the steam chest, and reached the left foot over onto the step, and reached up to open the slide in the door of the headlight cage; that as he stepped his whole weight onto that step, and reached up to open the trapdoor, the step tipped over, and threw him out, and he fell off on that side and struck on his hip, but did not become unconscious; that when the engine stopped his right foot was under the wheel of the rear engine truck; that that was on the night of February 19th; that on the morning of the 20th he had an amputation.

Assuming that the defendant was negligent in allowing the step to be used in its defective condition, yet we are all clearly of the opinion that the plaintiff was guilty of con-

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tributory negligence. The step was a convenience, but not an essential to the running of the engine. According to the plaintiff's own statement, the engine usually stopped 150 or 175 feet beyond the depot at Grand Meadow. He did not open his cab window, and go out along the running board, until after he had passed the depot door. There was no occasion for him to go out at all at that time. He knew all about the troubles he had had with the step during the three days immediately prior to the accident. He voluntarily went out upon the step, when no duty prompted, and with the knowledge of the defects above detailed, and thereby assumed the risk. The principles of law which preclude a recovery in such a case have been adjudicated by this court in cases too numerous to mention. It is unnecessary to repeat them here. Only a few of the more recent are here cited. *Hazen v. West Superior L. Co.* 91 Wis. 208; *Schultz v. C. C. Thompson L. Co.* 91 Wis. 626; *Schiefelbein v. Badger P. Co.* 101 Wis. 402; *Foss v. Bigelow*, 102 Wis. 413; *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615; *Leary v. B. & A. R. Co.* 139 Mass. 580. As indicated in the court's charge to the jury, the fact that the plaintiff, without any notice to the roundhouse foreman by the engineer or himself, requested the boiler maker, Myers, to fix the step, and the latter did so or attempted to do so, did not, under the facts or circumstances shown in the case, relieve the plaintiff from the operation of the ordinary rule that an employee assumes the risk of injury from appliances which he knows, or in the exercise of ordinary care might have known, were defective. The plaintiff testified, and it was undisputed, that such reports were to be made, or notice given, to the roundhouse foreman; that no such report was made to the roundhouse foreman at Austin on the day of the injury; that on the day of the injury and while at the station Wykoff, the plaintiff told the engineer that the step was loose again, and that the engineer told him to go out and take it off, and throw it

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onto the tank, the same as he had done on the previous trip; that it was his duty to obey the engineer, but that he did not do so, and tightened it himself; and when they got to Austin, instead of reporting the matter to the roundhouse foreman, as he should have done, he conferred with Myers, the boiler maker, with the result stated.

*By the Court.*— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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## McGOWAN, Respondent, vs. THE SUPREME COURT OF THE INDEPENDENT ORDER OF FORESTERS, Appellant.

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*September 9 — October 20, 1899.*

*Benefit societies: Change of beneficiary: Statements in application: Materiality: Fraud: Court and jury: Evidence: Prior declarations of insured: Agency: Admissions: Report of examining physician: Physicians and surgeons: Privileged communications: Hearsay.*

1. One who is insured in a mutual benefit association and who wishes to change the beneficiary must make the change in the manner required by his policy and the rules of the association, and any material deviation from that course will render the attempted change ineffective; but where the insured, having done every substantial act required of him, dies before the new certificate is actually issued, and only formal acts on the part of the association remain to be performed, the change will be considered to have been made, even in an action at law.
2. Answers of the insured, in his application for insurance, to questions concerning the health, death, or age at death of his ancestors and brothers and sisters, are material as a matter of law, and it is error to submit the question of their materiality to the jury, even though by the policy such answers are made the basis of the contract and declared to be warranties only so far as they are material.
3. In such a case, the insured in answer to the question for what disease he had been attended by a physician during the last five years, replied that he did not need any. He also declared at the close of his application that his answers were "true and correct," and that

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he had made no "intentional omission, concealment, or mental reservation of any material fact or circumstance relating to his past or present health, habits, or condition, or family history." There was evidence that he had a chronic cough and weakness of the lungs for two or three years before the application. *Held*, that the questions whether the insured had had a disease for which he needed the services of a physician during the time mentioned, and whether his answer that he had not needed any physician was not an intentional omission or concealment of a material fact as to his health, should have been submitted to the jury.

4. Declarations and admissions of the insured, made prior to the application, and so remote as to be disconnected with any act or fact showing his then condition of health, are incompetent as substantive proof to contradict the statements made in the application, as against a third party who is the beneficiary; but where there is independent evidence of the falsity of those statements, evidence of the prior declarations is admissible to show that the assured knew that the statements were false.

5. Where the examining physician of a fraternal insurance company is an officer of the local lodge, his report as to the physical condition of an applicant for insurance, made after a personal examination, is a statement of an officer of the insurer, made as a part and within the scope of his official duties, and as such is admissible in evidence as an admission of the insurer, under the same conditions as admissions of agents generally. *Hiles v. Hanover F. Ins. Co.* 65 Wis. 585, distinguished.

6. *It would seem* that the testimony of a physician that during the year preceding the issuance of a policy of insurance he was consulted by the insured as a physician and treated him for a disease, is inadmissible, since it must have been based either upon a privileged communication or upon hearsay.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

This is an action upon a benefit certificate issued by the defendant to one Edward C. Pion, on the 3d day of June, 1896; the said Pion being then a charter member of Court Desota, located at Galena, Illinois, and the defendant being a fraternal association issuing life insurance certificates to its members upon the assessment plan. The certificate, when issued, was made payable to one Frances Heid, the affianced

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wife of said Pion. The complaint alleges that on January 31, 1898, Pion duly changed the beneficiary, in accordance with the rules and regulations of the order, and thereby made his insurance payable to the plaintiff, his sister, and that Pion died February 9, 1898. The amended answer admits the issuance of the certificate of insurance, and death of the insured, and the furnishing of sufficient proofs of death, but denies that the beneficiary was ever changed, and further sets up the defense of false statements made by the insured in his application for insurance, by which the policy was avoided.

The rules of the order prescribing the manner in which the insured may make a change of beneficiary were put in evidence, and they provide, in substance, that such change may be made in the following manner: (1) By filing a written application with the local court for such change; (2) paying a fee of fifty cents; (3) surrendering the old certificate; (4) furnishing satisfactory evidence that he, and not the beneficiary, has paid the assessments; (5) whereupon the local court shall cause the application, duly certified by the court officers and sealed, to be transmitted, with the certificate, to the head office; (6) on the receipt of which, if approved by the supreme chief ranger, the supreme secretary shall incorporate in the certificate the desired change. The rules further provide that upon the issuance of the second certificate the first should thereby become null and void, and that no certificate should be assigned, nor the beneficiary changed, except in the manner so provided. The rules further provide that, upon proof of death and allowance of the claim, the remittance should be sent from the head office to the court officer, to be delivered to the beneficiary on the surrender of the certificate; and provide that, if satisfactory proof of its loss or destruction or other satisfactory cause for its nonsurrender should be furnished, the remittance might be delivered, upon execution of a proper release of all claims.

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It appeared by the evidence that the insured removed from Galena, Illinois, to La Crosse, Wisconsin, some time after the issuance of the original certificate, and lived with the plaintiff, his sister; that on the 23d of December, 1896, and prior to such removal, he made a written application to the local court for a payment to him of $1,000, on the ground that he was totally and permanently disabled from following any business, and stated that such permanent disability resulted from tubercular disease of the lungs. This application was accompanied by a certificate of the officers of the local court stating their belief that the statements of the insured were correct, and also by a statement of the court physician stating that he had examined the insured, and found that he was permanently disabled, as the result of bronchial and pulmonary irritation and the common symptoms of incipient pulmonary tuberculosis. This application was made under a clause of the certificate which provided for the payment of $1,000 to the insured in case of total and permanent disability. The certificate further provided for the payment of $2,000 to the beneficiary upon the death of the insured, less any sums which had been previously paid on account of permanent disability. This claim was not allowed. The insured was a railroad brakeman running on the Chicago, Burlington & Northern Railroad. He entered the road's service in September, 1894, as a brakeman on the main line, with headquarters at La Crosse, and was transferred to the Galena branch, with headquarters at Galena, in December, 1894, where he remained until July 1, 1895, when he returned to the main line, and so remained until January, 1896, when he went back again to the Galena branch, where he remained until December, 1896, at the time of making his application for benefits on the ground of permanent disability. He then ceased work on account of sickness, and went to Colorado, from whence he returned in April, 1897, and went to work again for the railroad com-

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pany as flagman, until October, 1897, when he ceased to work on account of sickness. From October, 1897, until his death, February 9, 1898, he seems to have lived at La Crosse with the plaintiff, his sister.

The head of the defendant order is called the supreme chief ranger, and he has his office at Toronto, Canada. In January, 1898, one Robert Kidney, a deputy of the supreme chief ranger, whose business, under the rules of the order, is to incorporate subordinate courts, look after those already in existence, and generally to represent the supreme chief ranger in that respect, came to La Crosse and saw the insured, on the 31st of January, at the home of his sister. The insured on that day told him that he wished to change the beneficiary in his certificate, and make the policy over to his sister, the plaintiff. Mr. Kidney produced the proper blank, and it was filled out, the fifty-cent fee was paid, and the application was at once transmitted to the local court at Galena for the signature of the court officers and the seal. The certificate was not surrendered, because it was then in the possession of Frances Heid, at Galena. The application reached Galena, and the proper certificate was placed thereon by the officers of that court, and the same was transmitted to the supreme chief ranger, and reached him February 7, 1898. The original certificate reached Mr. Pion on the 7th or 8th of February, but in what manner it was obtained from Miss Heid does not appear. He immediately delivered it to Kidney, who, on the morning of the 9th of February, being the day of Pion's death, mailed it to the proper officers at Toronto, where it was received February 11th; Pion having died, as before stated, February 9th. No new certificate was ever issued, nor does it appear that the original certificate was ever returned.

Prior to the issuance of the original certificate, and on the 4th day of May, 1896, the insured underwent a medical examination at the hands of the court physician at Galena,



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Illinois, who, after such examination, made favorable answers to thirty questions regarding the physical condition of Pion, and recommended him as a first-class risk. The insured also made answers to 157 questions with regard to his physical condition and his family history, and it is charged that the answers to a number of these questions were false, and that the insurance is invalid thereby. These questions and the answers will be more fully discussed in the opinion, and therefore it is unnecessary to set them forth at length here. The concluding paragraph of said statement contained the following affirmation: "I hereby affirm and declare that the answers to each and all of the above questions, also those made to the medical examiner, are true and correct, and that no intentional omission, concealment, or mental reservation has been made of any material fact or circumstance relating to my past or present health, habits, or condition, or to my family history, and I agree that the questions and answers herein contained shall form a part of my contract." The certificate contains the following provision: "In consideration of the application for membership, and of the agreements and statements therein contained, and of the statements, representations, and declarations contained in the medical examination paper (in so far as the said agreements, statements, representations, and declarations are material to the contract), and in consideration, also, of the warranty of the applicant that the same, being material to the risk, are true and correct, . . . and upon the faith and credit of all and each of which agreements, statements, promises, representations, provisions, and declarations, and in consideration of the payment of all assessments, dues, fees, capitation tax, and fines, this benefit certificate is issued," etc.

A special verdict was submitted to the jury, which, with its answers, is as follows: "(1) Was the statement in Exhibit No. 6, as to the cause of the death of the mother of

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insured, material to the contract? *A.* No. (2) Was the statement in Exhibit 6, as to the cause of the death of the mother of the insured, substantially true. *A.* Yes. (3) Was the statement in Exhibit No. 6, as to number of sisters of insured dead, material to the contract? *A.* No. (4) Was the statement in Exhibit No. 6, as to what diseases insured had been attended for by a physician during the previous five years, material to the contract? *A.* (By the court.) Yes. (5) Was the answer of the deceased to question 66 in Exhibit 6, 'What diseases have you been attended by a physician for during the last five years?' imperfect? *A.* Yes. (6) Was the statement in Exhibit No. 6, as to whether insured was in good health at that time, material to the contract? *A.* (By the court.) Yes. (7) Was the statement in Exhibit No. 6, as to the previous health of the father of insured, material to the contract? *A.* (By the court.) Yes. (8) Stricken out. (9) Was deceased in good health at the time he signed Exhibit No. 6? *A.* Yes. (10) If you answer the preceding question in the negative, then, when insured signed Exhibit No. 6, did he know that fact? *A.* ——. (11) Was the health of father of deceased good prior to his death? *A.* Yes. (12) If you answer the preceding question in the negative, then, when insured signed Exhibit No. 6, did he know that fact? *A.* ——. (13) Had his father, prior to his death, been afflicted with inflammatory rheumatism? *A.* No. (14) If you answer the preceding question in the affirmative, then, when insured signed Exhibit No. 6, did he know that fact? *A.* ——. (15) At the time insured signed Exhibit No. 6, was there anything, to his knowledge or belief, in his physical condition, family history, or personal history or habits, tending to shorten his life, not distinctly set forth therein? *A.* No. (16) In case the plaintiff is entitled to recover under the law, at what sum do you assess his damages? *Answered by the court:* $2,099."

Upon this verdict, judgment for the plaintiff for $2,099

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damages and costs was rendered, from which judgment the defendant appeals.

For the appellant there was a brief by *Mylrea & Bird*, and oral argument by *W. H. Mylrea* and *C. B. Bird*. To the point that the privilege of a physician applies to the disclosure of personal facts in regard to the individual himself, and not to the simple fact as to whether or not a physician had been consulted, they cited *Breisenmeister v. Supreme Lodge*, 81 Mich. 525; *Dittrich v. Detroit*, 98 Mich. 245; *Brown v. Metropolitan L. Ins. Co.* 65 Mich. 306; *Patten v. United L. & A. Ins. Asso.* 133 N. Y. 450; 3 Jones, Ev. 778; 2 Bacon, Ben. Soc. § 461.

For the respondent there was a brief by *Fruit & Gordon*, and oral argument by *J. J. Fruit*.

WINSLOW, J. The appellant's general contentions are: first, that the evidence shows that the beneficiary was never changed; second, that the evidence shows fraudulent and material misstatements in the application for insurance; and, third, that there were erroneous rulings upon evidence. These contentions will be considered in the order indicated.

1. It is now well settled that one who is insured in a mutual benefit association, and who wishes to change the beneficiary, must make the change in the manner required by his policy and the rules of the association, and that any material deviation from this course will render the attempted change ineffective. It is equally well settled that there are cases where literal and exact conformity with the requirements of the policy may be excused. In the case of *Supreme Conclave v. Cappella*, 41 Fed. Rep. 1, the subject is exhaustively reviewed, and the conclusion reached that there were three exceptions to the rule of exact compliance: First, where the society has waived strict compliance by issuing a new certificate without insisting on the performance of all the intermediate steps; second, where, by loss of the first

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certificate without fault, its surrender becomes impossible, a court of equity will not require an impossibility, but will treat the change as made if the insured has taken all the other necessary steps and done all in his power to make the change; third, where the insured has pursued the course required by the policy and the rules of the association, and done all in his power to make the change, but before the new certificate is actually issued he dies, a court of equity will decree that to be done which ought to be done, and will act as though a new certificate had been issued. *National Asso. v. Kirgin*, 28 Mo. App. 80; *Isgrigg v. Schooley*, 125 Ind. 94; *Grand Lodge v. Noll* (Mich.), 15 L. R. A. 350, note; *Marsh v. Supreme Council*, 149 Mass. 512; *Luhrs v. Luhrs*, 123 N. Y. 367; Bacon, Ben. Soc. (New ed.), §§ 310, 310*a*. The case at bar clearly comes within the last of the above classes. The insured had done every substantial act required of him by the terms of the policy and the rules of the society in order to make a complete change of beneficiaries. The last act was the surrender to the deputy chief ranger of the original certificate, at least one day before his death. He could do nothing further. On the part of the society there were simply formal acts to be performed. There was no discretion as to whether the society would allow the change. It is true the rules say that the change shall be made and a new certificate issued if the application be approved by the supreme chief ranger, but this approval plainly relates to matters of form only. It was the right of the insured to make the change before his death if he took the required steps, and if the new beneficiary was competent to be such under the rules of the order. We hold, therefore, that under the rules laid down in *Supreme Conclave v. Cappella*, *supra*, the insured in the present case had made an effective and complete change of beneficiaries.

But it is urged that the cases in which this doctrine has been applied are all cases where the money has been brought

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into court, and the other claimant has been interpleaded, and thus the action has become an equitable one, in which equitable principles may be and are applied, while the present action is an action at law, where strictly legal principles must prevail. The objection does not seem forcible. Either there was a change of beneficiaries or there was not. There is no middle course. Nor do we see how there could well be a change in equity and no change at law, or a change which should operate as to some parties and not as to other parties to the transaction. Therefore we hold that the facts here shown prove a change of beneficiaries, even though the action be one at law.

2. In the application for insurance the insured was asked this question, "(66) For what diseases have you been attended by a physician during the last five years?" to which he replied, "Did not need any." He also answered, in response to other questions, that his father's health previous to his death was good; that none of his near relatives had been afflicted with inflammatory rheumatism; that his mother died of inflammation of the bowels; that he had no sisters dead; that both his grandfathers were killed in the army; and that he himself had never had pleurisy, inflammation of the lungs, acute bronchitis, chronic catarrh, diseases of the throat and air passages, shortness of breath, chronic cough, or consumption. These answers were all attacked as false by the defendant, and much evidence was adduced in support of such claim of falsity. It will be noticed that a part of these claims are disposed of by the verdict, and some do not seem to have been disposed of at all. Thus, it is found that the cause of the mother's death was not material, and that the statement was substantially true; that the statement of the number of sisters dead was immaterial; that the answer to question No. 66 was imperfect; that the health of the father was good prior to his death, and that he had not been afflicted with inflammatory rheumatism; and that

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the deceased was in good health when he made the application; but the verdict does not state whether the statement as to the death of the grandfathers or the statement that he had no brothers dead were material to the contract. It appeared by the evidence, without contradiction, that the insured had one sister dead, whose funeral he attended a few years before his own death; that he had one brother who died in infancy; and that both his grandfathers died natural deaths. As will appear from the statement of facts, the representations and statements of the insured in his application are only made the basis of the contract and declared to be warranties *so far as material*, and hence, we suppose, resulted the submission to the jury of the various questions as to the materiality of the statements as to the deaths of brothers and sisters and the cause of the death of the mother. It would seem strange, indeed, if these were questions for a jury to pass upon. If a jury may say that the condition of health of near relatives, such as parents and brothers and sisters of the insured, is not material when inquired about as preliminary to the making of a contract of insurance, why may they not advance a step further and declare that the condition of health of the insured himself is immaterial? It is matter of common knowledge that family tendencies to disease, as developed in the immediate blood relatives, are of the utmost importance in judging of the probabilities of life. No expert knowledge is required to know that such matters are most material to be known by a proposed insurer, and are always carefully asked about, and that applicants are frequently rejected because of such family tendencies, although they may not have appeared in the insured themselves. Bacon, Ben. Soc. (New ed.), § 230. All of the questions as to the health or death, or age at death, of the ancestors or brothers and sisters of the deceased, were material to the risk as matter of law, and the court should have so declared. Whether inquiries concerning very remote

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relatives should be held material as matter of law is a question not before us now for decision. It was error, therefore, to submit the question as to materiality of the questions above referred to to the jury.

But there is another question which is of greater importance. The insured was asked, by question No. 66, for what diseases he had been attended by a physician during the last five years, and he answered that he did not need any physician. This fairly means that he had had no diseases during that time for which he needed the attendance of a physician. This answer was disposed of by the finding that it was imperfect, and the argument is made that because it was an imperfect answer, and because the company accepted the application without requiring it to be made more certain and responsive to the question, all objections are now waived. It needs no finding of the jury to show that it is an imperfect answer to the question, but, imperfect as it is, it states a material fact, and that is that the insured had not needed a physician for disease during the last five years. It states this fact plainly and unmistakably, and the insured affirmed and declared, at the close of his application, that this answer was "true and correct," and that he had made no "intentional omission, concealment, or mental reservation of any material fact or circumstance relating to my past or present health, habits, or condition, or family history." Now, as has been before said, there was much testimony in this case, aside from the physicians' testimony, to the effect that the insured had a chronic cough and weakness of the lungs for two or three years before the application, and both the question whether he had a disease for which he needed the services of a physician, as well as the question whether the answer to the sixty-sixth question was not an intentional omission or concealment of a material fact as to his health, should clearly have been submitted to the jury.

3. The evidence of certain fellow-workmen as to state-

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ments made by Pion concerning his health, in the summer of 1895, was offered by the defendant and ruled out, and this ruling is alleged as error. The rule is that declarations and admissions of the assured, made prior to the application, and so remote as to be disconnected with any act or fact showing his then condition of health, are incompetent as substantive proof to contradict the statements made in the application, as against a third party who is the beneficiary; but where, as here, there is independent proof tending to show falsity of the statements in the application, the evidence of the prior declarations of the assured is admissible to show his knowledge of the falsity of his answers. Bacon, Ben. Soc. (New ed.), § 460. The questions should have been allowed.

The examining physician, who was an officer of the local court of Galena, made a personal examination of Pion at the time of his application, and made a long written report, in answer to questions, as to Pion's physical condition, in which he gave a very favorable account of his health. This report was offered in evidence by the defendant on the trial, in connection with, and as part of, the application. Thereafter the plaintiff asked one of the medical experts a hypothetical question based on the facts stated in the physician's report, and the defendant objected, on the ground that the paper was not evidence of the facts stated in it, but only of the fact that such a report was made. The court overruled the objection, and held that the statements in the report were in the nature of admissions by the company of the facts therein stated, not conclusive, but competent to go to the jury on the subject. We think the ruling was correct. The statements were made by one of the defendant's officers, as a part of his official duties, and within the scope of such duties. Such statements are plainly statements of the company itself, and must be regarded as upon the same plane as the admissions of agents generally, made during the transaction

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of the agency business, and within its scope, which are deemed parts of the *res gestæ*. 1 Jones, Ev. § 256. The case bears no analogy to that of *Hiles v. Hanover F. Ins. Co.* 65 Wis. 585, where the statement of the insured in his proof of loss was sought to be used as evidence in his own favor.

Two physicians were allowed to testify that during the year 1895 they were consulted as physicians by the insured, and that they attended him for a disease. These questions were objected to, on the ground that they called for privileged communications, but the objections were overruled. While these rulings were favorable to the appellant, and therefore are not here for review, it is not improper to call attention to the fact that a physician who answers that he treated a man for a disease must obtain his knowledge either from information received from the patient or by observation of his symptoms, all of which are privileged (*Boyle v. N. W. Mut. R. Asso.* 95 Wis. 314), or from statements made by others, which are hearsay (*Edington v. Mut. L. Ins. Co.* 67 N. Y. 185).

We do not deem it necessary to consider any other points made. Enough has been already said to indicate the proper course to be pursued upon a new trial.

*By the Court.*— Judgment reversed, and action remanded for a new trial.

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GUNDERSON, Receiver, Respondent, vs. SWARTHOUT, Appellant.

*September 11 — October 20, 1899.*

*Fixtures: Electric light plant: Mortgages.*

A dynamo, exciter, and belts were placed in the building of an electric light company under an agreement to pay rent therefor, with an option to apply the rent on the purchase price of a larger dy-

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namo or to purchase the one so put in and apply the rent thereon. At the expiration of the option the company purchased the machinery so put in, intending, however, to purchase a larger dynamo thereafter. The dynamo weighed three and one-half tons, and was fastened to timbers in the building by means of lag screws, and was moved from time to time. The other machinery was fastened to timbers in substantially the same way. The outfit was of more than sufficient capacity to supply all the light the company had contracted to furnish, and was in operation at the time of a foreclosure sale under a mortgage given to procure funds to construct the plant. *Held* that, as between the purchaser at such sale and the original vendor of the machinery, the machines had become fixtures.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Thomas Morris* and *Losey & Woodward*, and oral argument by *G. M. Woodward.*

*Ray S. Reid*, for the respondent.

CASSODAY, C. J. This is an action commenced February 8, 1898, to recover a certain electrical machine known as a "dynamo," and a certain other electrical machine known as an "exciter," together with certain belts used in operating the same, or the sum of $1,600, the value thereof, in case a delivery cannot be had, together with damages and costs. Issue being joined and trial had, at the close thereof the jury returned a verdict wherein they found for the plaintiff, and that the articles of property mentioned were not fixtures, and that the value thereof was $1,500, and thereupon, and in pursuance of the order of the court, judgment was entered in favor of the plaintiff and against the defendant for $1,500 damages and $74.89 costs. From that judgment the defendant brings this appeal.

It appears from the record and is undisputed that December 27, 1893, the McMillan Mill & Power Company was incorporated; that October 22, 1894, the lands in question

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and described were deeded to that company and the deed was recorded; that November 14, 1894, the company gave a mortgage upon these lands to one A. S. Swarthout, father of the defendant, for $7,000, with which to construct the plant in question, and which mortgage was duly recorded; that the plant was never used for any other purpose than manufacturing and furnishing electric light; that April 2, 1895, the company procured a franchise from West Salem to put up poles and wires and furnish light in that village; that September 3, 1895, that company accepted a proposition made by the Stanley Electric Manufacturing Company to rent the dynamo, exciter, and belts in question, and allow the rental to apply on the purchase price of a larger machine, which the company had the privilege of ordering within four months from the day of shipment, and to be delivered on or before August 1, 1896, or to purchase and apply such rental on the machine in question,— the rental to begin October 1, 1895; that thereupon the dynamo, exciter, and belts were delivered to the company, and by the company placed upon the premises in question and used in operating the company's electric plant; that in January, 1896, and in pursuance of the contract for purchase and lease so made, the company purchased the dynamo, exciter, and belts in question and then in use in its electric plant mentioned; that May 7, 1897, such proceedings were had that the plaintiff was appointed receiver of all and singular of the property and assets of the McMillan Mill & Power Company; that the mortgagee, A. S. Swarthout, died testate in March, 1896; that his will was duly admitted to probate; that such mortgage was foreclosed, and the property sold by the sheriff on the judgment of foreclosure and sale to the defendant, and duly conveyed to him by the sheriff's deed, dated October 7, 1897, and recorded.

At the commencement of the trial of this action the parties stipulated to the giving of the mortgage, and the fore-

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closure and sale of the premises upon which the machines in question were situated, and that the sheriff's deed upon such sale vested in the defendant all the rights which would follow to the grantee on such foreclosure and sale; that the receiver was appointed as stated; that the suit might proceed without the formality of a writ of replevin going into the hands of any officer or any officer taking charge thereof; that no replevin bond should be required, and no actual service of the writ should be had; and that all formalities be dispensed with.

The evidence is to the effect that the dynamo weighed three and one-half tons; that the lower floor of the mill building was solid rock; that on this rock floor a pier about five feet square and sixteen inches high was built of rock and cement; that the top of it was covered with a bed of cement, and on and in this bed of cement was laid a frame of timbers about three and one-half feet square; that such cement as was left was mixed up with broken stone and thrown inside the wooden frame; that the dynamo was then set on the top of the wooden frame, and was fastened to it by lag screws going down into the timbers; that it remained and was operated in such way for about six months, when a second foundation was built for it, like the first one, about eight or ten feet away from the first, on the same floor, and the dynamo was moved to and placed on this second foundation in the same manner as it had been on the first, and was about on a level with the power shaft from the mill wheel; that the exciter was a necessary part of the dynamo, and was at all times firmly fastened by screws to the building; that the switch board — without which the dynamo could not be used — was also at all times firmly attached to the building; that September, 1896, the dynamo was removed, and lifted up to the floor above, about fifteen feet higher than the first floor, and some distance further away from the power shaft, so that the belt from the power shaft ran

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upwards to the dynamo at an angle of about twenty degrees; that it rested on timbers spiked to the floor, and lag screws held the dynamo on these timbers; that it was heavy enough to remain in this position by its own weight without such fastenings.

The only question presented is whether the dynamo, exciter, and belts constituted fixtures to the real estate. It is true, as contended by the plaintiff's counsel, that at the time the company purchased the machines it contemplated buying a larger dynamo, and took the one in question so as not to lose its franchise at West Salem. But it never did purchase any other, and the dynamo in question was of ninety horse power, whereas sixty horse power would have supplied all the lights the company ever agreed to furnish. The machines were certainly adapted to the use to which they had been put during the two years immediately prior to the time when the defendant received the sheriff's deed. It was held in this state at an early day that where an equitable mortgagor, with the consent of the owner of personal property, annexed the same to the freehold, the fixture could not be removed as against such prior mortgagee. *Franklin v. Moulton*, 5 Wis. 1. In that case the owner of a steam engine sold the same to the mortgagor, and assisted in annexing the same to the realty, reserving a chattel mortgage on the same for a part of the purchase money; and it was held that the chattel mortgage was inoperative as against such prior equitable mortgagee. The rulings in that case have received frequent sanction. *Cooper v. Cleghorn*, 50 Wis. 121; *Taylor v. Collins*, 51 Wis. 127; *Kendall Mfg. Co. v. Rundle*, 78 Wis. 150; *Homestead L. Co. v. Becker*, 96 Wis. 210.

Two of these cases have declared as the test for determining whether articles of machinery are fixtures: "(1) Actual physical annexation to the realty; (2) application or adaptation to the use or purpose to which the realty is devoted; (3) an intention on the part of the person making the an-

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nexation to make a permanent accession to the freehold." The same criterion has been maintained in other states. *McRea v. Central Nat. Bank*, 66 N. Y. 489. In the case at bar these tests all seem to be complied with. Certainly the machines were all adapted to the purpose to which the realty was devoted.

In determining between mortgagor and mortgagee whether erections are fixtures and hence a part of the realty, or personal property, the same rules prevail which are applicable between grantor and grantee. *Snedeker v. Warring*, 12 N. Y. 170; *McFadden v. Allen*, 134 N. Y. 489. Thus, it has been held that a kettle or boiler in a brewhouse is a part of the freehold, and a fixture. *Gray v. Holdship*, 17 Serg. & R. 413; *S. C.* 17 Am. Dec. 680. So hop poles which have been used in the cultivation of hops, although piled upon the premises with the intention of being used again the next season, have been held to be a part of the realty and fixtures. *Bishop v. Bishop*, 11 N. Y. 123; *S. C.* 62 Am. Dec. 68. The same rule prevails as to rails and fencing material deposited along the line, and ready to be put in place. So a statue erected as an ornament to the grounds has been held to be a part of the realty, although it was not fastened to the base on which it rested, and could be removed without fracture. *Snedeker v. Warring*, 12 N. Y. 170. The rule seems to be less stringent in Massachusetts, but even there large and heavy machinery procured for the use of a mill has been held to be a part of the realty. *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519. Of course, in all such cases the purpose of the annexation is a very important consideration. *Homestead L. Co. v. Becker*, 96 Wis. 210. Where the machinery attached is adapted to the purpose to which the realty is devoted, and is for the permanent use and improvement of the freehold, it is a fixture and a part of the realty; but where it is attached for a mere temporary use, with the present intention of removal,

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it continues to be personal property. *Homestead L. Co. v. Becker*, 96 Wis. 210; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *McFadden v. Allen*, 134 N. Y. 489. In this last case it was held, in effect, that if the mortgagor, or one claiming under him, "intended to assert title to the fixtures, he was bound to do so in the foreclosure suit, and was estopped by his default therein from making such a claim as against the purchaser or his grantee."

The mere fact that at the time of purchasing the machines in question the company intended to purchase a larger dynamo does not imply that it was not adapted to the purpose for which the realty was devoted, nor that it was not its intention to continue its use until supplanted by a more powerful one; in other words, there was no purpose of running the plant without a dynamo. On the contrary, the manifest purpose was to continue the use of a dynamo permanently, and keep the one in question until the company should be able to get a better one. Such time never arrived.

We must hold, upon the undisputed evidence, that the machines in question became fixtures, and the title to the same passed to the defendant as purchaser at the foreclosure sale.

*By the Court.*—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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GRUNERT, Respondent, vs. SPALDING and others, Appellants. 104 193 105 103

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*September 12 — October 20, 1899.*

*Towns: Formation: Discretion of county board: Jurisdiction of taxing officers: Land grant for military road: Exemption from taxation: Co-contractors: "Assigns" of contract: Patents of land: Practical construction of statute: Estoppel: State officers: Judgments: Conclusiveness: Parties and privies.*

1. It will be assumed, at least in the absence of a clear showing to the contrary, that a county board, in the exercise of the discretion delegated to it in respect to the formation of towns, was controlled by proper motives and sufficient reasons.
2. A single tract of land, surrounded by an unbroken boundary line and capable of being traversed from one extremity to the other without leaving its territory, may, in the discretion of the county board, be designated as a town, even though it has a length of 110 miles and at places is but two or three miles wide; and all the lands embraced within the limits of a town so designated will be within the taxing jurisdiction of its officers.
3. Ch. 429, P. & L. Laws of 1867, exempting from taxation lands granted by Congress to aid in the construction of a military road, limited such exemption to the "time that the title to such lands shall remain in the state or in the contractor to construct said road or his assigns." The contract could be assigned only with the consent of the commissioners and upon the giving of a bond by the assignees for its full performance. After the acceptance of a bid for the work, but before the execution of the contract by the successful bidder, two persons agreed with him to pay him a certain sum per mile for so much of the road as the three might decide should be built, he agreeing to build that portion of the road and that they should receive three fourths of the land earned thereby. *Held*, that said persons were not co-contractors for the work nor assigns of the contractor, within the meaning of the act of 1867, so as to make their shares of the lands earned exempt while held by them.
4. The fact that a patent for a portion of the lands earned was issued by the governor to one of said persons "as partner and assignee of" the contractor does not conclusively show that he was such so as to entitle him to the exemption, as the result either of a practical construction of the contract or of an estoppel.
5. The state is not bound or estopped by a construction placed by a state officer upon a contract made under legislative authority,



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where he is not authorized to act for the state in that particular respect.

6. In a subsequent litigation between the same parties or their privies, though upon a different cause of action, the conclusiveness of a prior judgment as to an issue actually decided thereby cannot be avoided by a mere new argument which, though not then urged, was necessarily, in effect, overruled by the previous decision, nor by new or different evidence upon the same question.

7. In a subsequent litigation between the same parties or their privies on a different cause of action, a prior judgment is conclusive only as to those issues which affirmatively appear to have been in fact adjudicated.

8. The mere personal effect of a judgment is absolutely confined to the parties to the litigation, and does not attach to or become a rule of property as to any other thing than the particular subject of the controversy which was closed by the judgment.

9. It is only when the particular property or right which has been transferred is affirmatively shown to have been the subject matter of the former adjudication, and its status settled thereby, that the effect of that litigation is conclusive upon a grantee or transferee of property.

APPEAL from a judgment of the circuit court for Oconto county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

By an act of Congress of March 3, 1863 (12 Stats. at Large, 797), there were granted to the states of Wisconsin and Michigan certain lands as aid for the construction of a military road from Ft. Wilkins, Copper Harbor, Keweenaw county, in the state of Michigan, to Ft. Howard, Green Bay, in the state of Wisconsin. That grant was accepted by the state of Wisconsin, by ch. 478, Laws of 1864, by which act was created a commission authorized to survey and contract for the construction of such a road through Wisconsin, to be paid for only in the granted land.

On August 4, 1864, those commissioners entered into a contract with James M. Winslow, of St. Paul, for the construction of the road in Wisconsin, in consideration of three sections of land to a mile of road. That contract did not exactly comply with the terms of the act of 1864. It was

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assigned by Winslow, with the consent of the commissioners, to the United States Military Road Company, a corporation, and by that corporation, on August 9, 1866, again with the consent of the commissioners, was assigned to Jackson Hadley; the commissioners extending the time for completing the construction to August 24, 1868. By Gen. Laws of 1865, ch. 331, the variation of the contract from the law of 1864 was authorized, and by P. & L. Laws of 1867, ch. 79, the terms of the contract, and its assignment and extension to Hadley, were ratified and confirmed. Hadley and his assignors prior to March, 1867, had constructed, and the commissioners accepted, thirty miles of said road, leaving about 110 miles for construction.

Hadley died March 3, 1867, and, shortly after, the commissioners formally determined that the work of constructing said road was not diligently and properly prosecuted, and that the representatives of said Hadley had forfeited all rights which they might have by virtue of said contract, and proceeded, in pursuance with the act of 1864, to advertise anew for bids. One J. W. Babcock was the only bidder, and he offered to build the remainder of the road, exclusive of the thirty miles constructed by Hadley, at the same rate of three sections per mile, payable as each ten-mile division of the road was completed, which proposal was opened, accepted, and approved by the commissioners on May 30, 1867, and a contract made in pursuance thereof on July 20, 1867, providing, among other things, "that this contract, and every part thereof, and any interest or interests therein, shall not be assigned or assignable to any person or persons, firm or corporation, in any manner or for any purpose whatsoever, without the written consent of the said commissioners, or their successors in office, first had and obtained, giving the name of the assignee or assignees agreed upon; such assignee or assignees to give bond to the state of Wisconsin according to the aforesaid act of the legislature of Wisconsin."

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Said contract also recited the forfeiture and cancellation of the Winslow-Hadley contract.

Shortly prior to the making of the Babcock contract of July 20, 1867, and after the acceptance of his bid, to wit, July 12, 1867, a written agreement was entered into between George N. Fletcher, J. W. Babcock, and A. G. Crowell, the material part of which is as follows: "This agreement, made this above date by and between George N. Fletcher, of the one part, J. W. Babcock, of the second part, and A. G. Crowell, of Lock Haven, Pennsylvania, of the third part, whereby the above-named parties agree to purchase of the heirs of Jackson Hadley their interest in the unfinished part of the United States Military Wagon Road, commencing at Green Bay, Wisconsin, and running north to the state line, being some one hundred and ten miles, for which the parties agree to pay five thousand dollars, as per agreement with Otis B. Hopkins, representative of the said heirs, and J. W. Babcock. The said Crowell agrees to pay one fourth part the said five thousand dollars, and also the one fourth part of the cost of building so much of the said road as the parties shall decide to build, and the said Fletcher is to pay three fourths of the said five thousand dollars and the building of said road; and the said Babcock agrees to spend his time in overseeing and doing the work in building said road, for which said Babcock is to receive for his share one fourth part of the whole amount of land received for said job; and the said Crowell is to receive one fourth part of the balance of said lands, after taking out said Babcock share, and the said Fletcher is to receive three fourths of the balance left. The said lands may be equally divided, each one receiving his share in acres, by making as many divisions as may be necessary and each one bidding for the same, or they may be held in common and sold and the proceeds divided as the parties hereafter shall decide. . . . And it is further agreed, if, upon examination, that it will

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not be advisable to build more than thirty miles of said contract, or any other part of said contract, then the said Babcock is to be released from overseeing the same, but is to receive *pro rata* for the number of miles he may build in proportion to the whole as hereinafter agreed upon; and the said J. W. Babcock hereby binds himself to build the whole one hundred and ten miles, and to get the same accepted by the commissioners, for the sum of thirty thousand dollars, to be paid him by the said Fletcher and Crowell, as above stipulated."

In pursuance of this contract an assignment was procured from the administratrix of Hadley, dated July 19, 1867, of all of the Winslow-Hadley contract, except the thirty miles of road already completed and the lands due therefor. It also appears that on the 23d of July said administratrix also conveyed to Crowell all interest in the first thirty miles and the lands due therefor, subject to indebtedness to a subcontractor.

Babcock proceeded with the construction of the road under his contract with the commissioners of July 20, and by November 25, 1867, had completed forty miles of said road, which was certified to the Secretary of the Interior by the governor, and place lands approved to the state of Wisconsin therefor May 10, 1868, and indemnity lands on April 5, 1869. The indemnity lands so approved include the lands involved in the first and second causes of action here.

On April 1, 1868, Babcock assigned to one Charles M. Smith, of Chicago, an undivided one-fourth of all the lands earned by the construction of said forty miles of road, in pursuance of which, on February 23, 1870, a patent for said undivided one-fourth was issued to him by the governor of Wisconsin. . His interest, however, is not further involved in controversy in this action, the taxes thereon having been duly paid.

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On June 20, 1873, Babcock executed to A. G. Crowell an assignment of an undivided three-sixteenths of the same lands, requesting the governor of the state of Wisconsin to issue to said Crowell a patent therefor, and containing no intimation of any previous rights of Crowell therein. On July 7, 1873, said undivided three-sixteenths was patented by the state to Crowell, the patent reciting the act of Congress of April 4, 1864, the previous contract with Winslow (assigned to Hadley), the completion of thirty miles by him, the cancellation of that contract, the assignment of the unperformed part of that contract to Babcock, Crowell & Fletcher, the making of the new contract with Babcock, and the construction of the forty miles of road, and the assignment of June 20, 1873, of Babcock to Crowell.

On May 29, 1868, Babcock executed an assignment to George N. Fletcher of an undivided nine-sixteenths of the lands due for building the forty miles of road then already accepted, reciting the making of the contract of July 20th with the commissioners, and requesting the governor to deed said share to Fletcher. On March 4, 1871, a patent was made by the governor to Fletcher, containing substantially the same recitations as those mentioned in the Crowell patent, and also reciting that the assignment to Fletcher was made in pursuance of the contract between Babcock, Fletcher, and Crowell, of July 12, 1867, whereby Fletcher became and was a partner with said Babcock in building said road, and as such partner furnished a portion of the money to build said forty miles of road, and was to receive as his share nine-sixteenths of the land earned in building the same. This patent runs to Fletcher, as follows: "Do give and grant unto the said George N. Fletcher, partner and assignee of said John W. Babcock as aforesaid," etc.

Before the making of Babcock's bid, to wit, on April 9, 1867, by what is known as chapter 429 of the Private and Local Laws of that year, it was provided that all the lands

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located in the state of Wisconsin, granted by the act of Congress of March 3, 1863, or which might thereafter be granted by Congress, to aid in the construction of the military road, "are hereby exempt from taxation and from assessment of any kind, up to the 3d day of March, 1873, and during the time that the title to such lands shall remain in the state, or in the contractor to construct said military road, or his assigns: provided, that such lands, or any part thereof, shall not be exempt from taxation from and after the time the same shall be sold and conveyed by the contractor or his assigns to purchasers for actual settlement, or for the timber or minerals on the same, or for speculation; and provided further, that such exemptions shall not extend to any land which may now be or may hereafter be improved and held by the contractor or his assigns; and provided further, this act shall be so construed that such exemptions shall extend to any and all such lands as may be pledged or conveyed as security for money raised to enable the contractor or his assigns to pay for constructing said military road, or any part thereof, so long as such lands so pledged or conveyed as security shall be so held; and provided further, that nothing in this act contained shall be so construed as to exempt any of such lands mentioned in this act from taxation or assessment after the third day of March, eighteen hundred and seventy-eight, for that purpose." The foregoing act was amended by ch. 219, P. & L. Laws of 1868, by substituting the figures "1869" in place of "1873" and in place of "1878," where those years appear, so as to cut down the exemption from taxation to March 3, 1869. This last act was repealed in terms by ch. 178, P. & L. Laws of 1869, approved March 4th of that year,— the day after the limitation had expired.

During several years including and prior to 1875 this title of Fletcher, while still remaining in him, was assessed for taxation, and, the taxes not being paid thereon, the lands

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were sold in May of the various years from 1872 to 1876 inclusive; and the tax certificates upon said sales were held, some by the county of Oconto, and some by one S. A. Coleman. On March 30, 1877, Fletcher brought suit in the circuit court for Oconto county against the officers of the county of Oconto and S. A. Coleman. The complaint alleged the act of Congress of March 3, 1863; its acceptance by the act of April 4, 1864, and the appointment of the commissioners; the passage of the taxation exemption act of April 9, 1867; publication of that act; the making of the so-called partnership agreement of July 12, 1867, between Fletcher, Babcock, and Crowell; the making of the contract by the commissioners with Babcock on July 20th; and alleged that said contract, although taken in the name of said Babcock individually, was in fact taken for the benefit of Babcock, Crowell, and Fletcher as partners; alleged the building of the forty miles of road in 1867, and the conveyance by the United States of the lands therefor; that the agreement by Babcock with the commissioners was made with full knowledge on the part of himself and of the commissioners, "and of the members of the firm of Babcock, Fletcher & Crowell, of the existence and of the tenor and effect of said act of the legislature exempting all the lands so granted by the United States to the state of Wisconsin from taxation and assessment of any kind during the time that the title to said lands should remain in the state, or in the contractor to construct said military road, or his assigns, and that the fact that said state so agreed to exempt said lands from taxation entered into the consideration for the construction of said road, and was a material part of such consideration and of the contract between said commissioners and said firm."

The complaint also alleged that all of the lands described (which include those here involved) were earned by the construction of said road by the plaintiff, Fletcher, and his cocontractors above named, and "are a portion of the lands

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granted to the state of Wisconsin by the United States to aid in the construction of said road, and are lands which were and are by said act of the legislature exempted and agreed to be exempted from all taxes and assessments as therein provided, to wit, until March, 1873, and during the time that the title thereto should remain in the state or in the contractor to build said wagon road." And, further, "that the lands were so earned in 1867, and were afterwards conveyed to this plaintiff by said state of Wisconsin, by patent, in payment for his proportion of the work done upon said road, as one of the contractors for building the same, in and during the year 1867, and that the same are now still owned and held by this plaintiff, and the title thereto still remains in him, and that he hath never improved any portion thereof or done anything with or to them whatsoever." The complaint proceeded further to allege the location of the various lands, those here in dispute being for the year 1875 claimed by the town to be located in the town of Marinette; the allegation being that said town was not contiguous, and that the lands were separated from the town of Marinette. The complaint also alleged that none of said lands were valued by the assessors from actual view, as required by law, but that the valuation was made arbitrarily and without view, and that the tax sales of any portion of said lands were absolutely null and void, and further alleged the failure of the assessors to take and subscribe oaths as required by law. The complaint prayed injunction against the issue of deeds on account of any of said tax sales, and for general relief.

The defendant Coleman did not appear in said action, and no answer on behalf of the board of supervisors or the county clerk appears in the record. On October 21, 1878, the court made his findings of fact, and entered judgment for the plaintiff. The court found that all the allegations of the complaint were proven and were true as therein stated, and adjudged "that all the lands described in the patents issued

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by the state of Wisconsin to the above-named plaintiff . . . are exempt from taxation of all and every kind to the date of filing the complaint herein, to wit, up to March, 1877, and that all tax sales thereof, or any part thereof, prior to that date, are absolutely null and void, and that all the certificates issued upon any sale of any of said lands prior to that date are hereby canceled and annulled; and the defendants, the board of supervisors of the county of Oconto, and Robert Ellis, county clerk of the county of Oconto, and their, and each of their, successors in office, agents, deputies, and employees, are commanded and enjoined perpetually to refrain and desist from selling or disposing of any of the tax certificates on any of said lands, or issuing any tax deed upon any of the lands, in either of said patents described, on account of any sale thereof for taxes of any year prior to the year 1876, to wit, on any of the tax certificates in the complaint in this action described. Said lands are described as follows, to wit: 'An equal undivided nine-sixteenths of the following described lands' [including the lands involved in the first and second causes of action in the present case]."

The same lands were again assessed for taxation for the year 1876 by the town of Marinette, and in May, 1877, the interests of Fletcher and Crowell were sold for nonpayment, and tax certificates issued to Oconto county. A tax deed in due form was thereafter issued to one W. H. Webster, as assignee of said county, on the 17th day of September, 1885, and duly recorded on the 22d day of October, 1885; and in May, 1886, said Webster quitclaimed to the above-mentioned S. A. Coleman an undivided one-fourth of whatever interest he acquired under the tax deed, which interest, together with the right of action for the trespasses of the defendants, was conveyed to the plaintiff before the commencement of this suit.

The Fletcher nine-sixteenths interest was conveyed by Fletcher November 5, 1879, to Bray and Choate, who before

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the trespasses conveyed the same to the defendants. The Crowell three-sixteenths was conveyed some time after the year 1877, and came through mesne conveyances to Bray and Choate, who before the alleged trespasses conveyed the same to the defendants. The four-sixteenths interest which had been patented to Smith came through mesne conveyances to Bray and Choate September 25, 1876, and had been conveyed to the defendants before the alleged trespasses. The trespasses sued for in the first and second causes of action were committed about April 1, 1894, and April 1, 1895, and before conveyance of the lands to plaintiff. It was stipulated that the amount of damages recoverable by the plaintiff, by virtue of his one-quarter of twelve-sixteenths of the lands, was $10,000, if his title is valid.

Maps showing the arrangement of certain towns in Oconto county at various stages in the history of that county were put in evidence, by which it appeared that town 39, range 12 east, in which the lands in controversy are situated, in 1876 was in the town of Marinette, and that said town was bounded on the northeast side by the state line between Wisconsin and Michigan, which was marked by the Menomonee river, and was bounded on the south and west by an irregular line marked by a series of north and west jogs, but extending generally in a northwesterly direction, and, on the line between towns 23 and 24 in range 21 east, approaching to within two miles and a half of the state line; so that it appeared that the inhabited part of the town of Marinette, in the southeast point thereof, was connected by a very narrow strip with the great bulk of the territory of the town, lying to the north and west of the northeast corner of town 23, range 20, which defendants claim was a practical infringement of the contiguity of the territory of said town. It does appear, however, that the boundary of said town at that time was a continuous line, and no other town or territory intervened, or needed to be passed over in perambulating such boundaries.

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In 1894 and 1895 the defendants held patent title to certain other lands in said town 39, range 12 east, and cut timber thereon. Said lands were assessed for taxation by the town of Marinette for the year 1876, and were sold in May, 1877, a tax certificate issued to Oconto county, and a tax deed issued May 10, 1880, to J. M. Simpson, as assignee of said county, and duly recorded May 21, 1880, which lands were quitclaimed by said Simpson to one William Urquhart June 11, 1886, and on May 23, 1896, were transferred by said Urquhart to the plaintiff, together with his rights of action for any trespasses thereon, which trespasses constitute the third and fourth causes of action. It was stipulated that the damages to which plaintiff is entitled for timber cut in 1894 and 1895 on these lands are $2,500, if his title be valid; the only ground of attack on his title being an alleged invalidity of the tax proceedings by the town of Marinette, by reason of its shape and the asserted noncontiguity of these lands to the inhabited part of the town.

It appeared by the findings that the greater part of the lands situated in township 32, ranges 20 and 21, where the town of Marinette is narrowest, were owned by the Peshtigo Company, which had its sawmills on, and also at the mouth of, the Peshtigo river, and that timber from said lands was floated down the said river; also, that a road extended from the village of Marinette, up along and near the west bank of the Menomonee river, to the vicinity of section 24, in township 32, range 22, and that a road also extended from Peshtigo up the Peshtigo river to said lands situated in town 33, ranges 20 and 21, and no road connected the territory in the town of Marinette, along the Menomonee river, with the Peshtigo road, or the territory lying along the same, and that the interests of such localities were separate and distinct; also, that the lands in the town of Marinette, up to 1867, north of the line between townships 23 and 24, were valuable chiefly for pine timber, which was chiefly tributary to the Menomonee river, down which it was floated to mills

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at Marinette. The circuit court held the plaintiff's title to both parcels of land valid, and rendered judgment for $12,500, from which the defendants bring this appeal.

The appellants contend that plaintiff's title, founded on tax deeds for taxes of 1876, is invalid: First, because the claimed noncontiguity of the town of Marinette deprived its officers of power to assess or levy taxes on any of the lands; second, that the lands involved in the first and second causes of action were exempt from taxation in 1876, in the hands of Fletcher and Crowell, by virtue of ch. 429, Laws of 1867; and, third, if neither of the former contentions is sustained, that the interest of Fletcher in said lands has been adjudged exempt, and that such adjudication is conclusive in this action, as against the plaintiff as a privy with Fletcher.

For the appellants there were separate briefs by *E. C. Eastman* and *Hooper & Hooper*, and oral argument by *Mr. Eastman* and *Mr. Moses Hooper*.

*H. O. Fairchild*, of counsel, for the respondent.

The following opinion was filed March 14, 1899:

DODGE, J. 1. The first question which naturally arises, and the only one which affects all of the causes of action, is whether or not the lands in the year 1876 were within the taxing jurisdiction of the officers of the town of Marinette. It is vigorously contended by the appellants that because this town has been laid out and extended northwesterly from township 30, range 23 east, to township 42, range 11 east, thus having a length of about 110 miles, and there being places in the course of such extension where said town was only two or three miles wide, it falls within the rule laid down in *Chicago & N. W. R. Co. v. Oconto*, 50 Wis. 189. In that case the authority of the taxing officers of the town in question was assailed for the reason that the lands assessed were entirely outside the inclosing boundary of the territory wherein the taxing officers resided; that is to say, two dis-

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tinct and separate parcels of territory were attempted by the ordinance to be called one town. Each portion was separate and distinct from the other, surrounded by its own boundaries, and access from one to the other was necessarily intercepted by some part of another town or towns. In that case, after an exhaustive study of the history of such civil divisions, and of the derivation and terminology of the word town, it was held that such an arrangement as there presented was not within the constitutional permission given to boards of county supervisors. The ultimate decision, being that a town must consist of contiguous territory, was predicated upon the proposition that the significance of the word was a single inclosed space, and could not be satisfied by two distinct entities; the further consideration evidently having weight with the court, that such an arrangement as there presented was restrictive of the sovereign power of the legislature to organize assembly districts consisting of contiguous territory and bounded by county, precinct, town, or ward lines.

The reasons involved and necessarily considered in determining the shape and boundaries of the civil subdivisions of the state are essentially legislative in their character. Those reasons are too numerous and various for expression. Especially are they complicated within the forest portions of the state. Distances there cease to be measured by miles, but by possibility of intercourse. Relationships of interest and convenience are affected largely by the courses of the rivers and their tributaries. Large areas exist, or did exist, utterly devoid of inhabitants, which it is obvious cannot properly be laid off into towns by themselves; for the town contemplated by the constitution is a civil entity, exercising some functions of government,— conditions which cannot be met in the absence of inhabitants to exercise that government.

In the present case it appears that the town of Marinette was laid off generally as tributary to the Menomonee river,

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and that the southerly or southwesterly line of that town approximately followed the divide between the tributaries of the Menomonee and the tributaries of the Peshtigo. The value of the remote portions of the town consisted in the growing timber, which, as appears by the findings, was largely the property of people having a location, if not a domicile, near the mouth of the Menomonee, and in the extreme southeastern part of the town. At the moment of assessment, on the 1st of May, much of such property is in a transitional state, having been severed from the land, and being on its way along the streams from where it grew to the sawmills where it is to be converted. Serious, though perhaps not insuperable, entanglements may well arise in the exercise of the various functions of town government over such property, if, at different stages of its progress from the tree to the mill boom, it is in different jurisdictions. The expenditure of town taxes for roads was largely controlled by the consideration of affording access from these settled portions to the remote lands owned there, and these roads made territory connected by them more contiguous and accessible than other regions much nearer in miles. These considerations, and many others which might be mentioned, serve only to emphasize the proposition before announced, that the legislature, and those bodies exercising legislative powers, are properly and necessarily invested with the discretion and judgment how to harmonize such conflicts. The judicial branch of the government has no equipment for such service, and whatever abuses may arise under the system of control by legislature and its delegates, promptly responsible to popular criticism, they would certainly be greatly increased, though perhaps varied in kind, were the courts to attempt to assume this function. *Washburn v. Oshkosh*, 60 Wis. 453, 457. We cannot presume any motives but right ones as controlling county officers in the exercise of the discretion delegated to them by

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the constitution in the formation of these towns. Counsel strenuously argue that the purpose was to reach for taxation remote property, to lighten the burdens of those resident in the southeastern part of the town; but it was clearly right that these valuable timber lands should pay their share of the tax burdens of the state, and it is by no means certain that the least equitable arrangement is that those taxes should go to the treasury of the community who owned the lands, where were made the contracts with reference to them, and where the government would be called into action to render the aid and protection which are the ultimate justification of all taxes. *Wagoner v. Evans*, 170 U. S. 588. Suffice it to say, however, that it is not for the court to find reasons to justify the acts of officers in other branches of the government, but to assume, at least in the absence of clear showing to the contrary, the righteousness of their motives and the sufficiency of their reasons. We do not think it within the province of the court to say that this single tract of land, surrounded as it is by an unbroken boundary line, capable of being traversed from one extremity to the other without leaving its territory, is necessarily beyond the discretionary power of the county board to designate as a town; and, as a result, we hold that the objection to the jurisdiction of the taxing officers of the town of Marinette is not well taken. *Chicago & N. W. R. Co. v. Langlade Co.* 56 Wis. 614; *Schriber v. Langlade*, 66 Wis. 616; *Land, L. & L. Co. v. Brown*, 73 Wis. 303.

This conclusion disposes, adversely to the appellants, of the only question presented with reference to the third and fourth causes of action, and sustains the judgment rendered for the trespasses therein sued for, in the sum of $2,500. It also necessitates consideration of other questions relating to the first and second causes of action.

2. Were the interests of Crowell and Fletcher in these lands exempt from taxation in 1876, by virtue of ch. 429,

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Laws of 1867? The considerations urged under this head are numerous, but the view we take of one of them makes discussion of the others unnecessary in disposing of this case. The exemption accorded by that act is limited to the "time that the title to such lands shall remain in the state or in the contractor or his assigns." The context shows clearly that the assigns referred to are assigns of the contract.

Were Fletcher and Crowell assignees of the contract with Babcock of July 20, 1867? It should be noted that there can be no contention that the lands in question were earned under the Winslow-Hadley contract, so the assignment of that contract to Fletcher and Crowell is not a material circumstance. It is expressly found in the stipulated finding of facts that the work of constructing the road was done under the Babcock contract of July 20th, and it is also found that the Winslow-Hadley contract had been declared forfeited by the commissioners.

The question is, therefore, as to the effect of the agreement of July 12th between Babcock, Crowell, and Fletcher. Babcock was the contractor, and by the terms of his contract he could assign only upon condition that the commissioners should consent in writing and that the assignees should give bond to the state of Wisconsin according to the terms of ch. 429, which required a bond conditioned on the full performance of the contract.

The agreement between Babcock, Crowell, and Fletcher does not, in terms, assign this contract, which, indeed, was not executed until a week later. It is, however, strenuously urged that the agreement constitutes a copartnership for the purposes of carrying out the contract with the commissioners, so as to make them co-contractors with him, or equitable assignees thereof. When reduced to its ultimate terms, that contract is simply that Crowell and Fletcher will pay to Babcock a proportionate part of $30,000 (about $273 per per mile) for so much of the road as the three decide shall



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be built, in consideration whereof Babcock agrees to build that portion of the road and that Crowell and Fletcher shall receive three quarters of the lands earned thereby. There is scarcely any element of partnership here. Crowell and Fletcher did not risk their investment upon the contingencies of the success of the work. No agency was created whereby, either as between themselves or to third persons, they became responsible for any engagements made by Babcock. If he was solvent,—a fact as to which there is no information,—it would have been an absolutely safe investment, by which they were assured three quarters of a specific quantity of land at a definite price, and, if they failed to obtain it by his failure to build the road, could have held Babcock in damages for breach of his contract. Further, the amount of their payment was not to vary according to the cost of the road. Babcock received the whole amount whatever the road cost, and received the same rate per mile whether the portion in fact constructed was more or less expensive than the average. Whether he made profit or loss in the enterprise, they were not to share in it. It is, as between the three, apparently a purchase of a specific interest in an ascertained quantity of lands at a fixed price, payable in advance, and not a partnership.

Whether or not these three were partners as between themselves is, however, quite inconclusive upon the question whether they were assignees of the contract within the tax exemption statute of 1867, when considered from the point of view of the state, which, of course, must control in construing that act. The object to be accomplished by these various legislative enactments and the contract under them was to obtain a road, according to the specifications, between certain termini. The contractor bound himself to build the whole road; so that, if for portions of it the lands assignable were more valuable than for other portions, or if some parts were more expensive than others to build, it made no dif-

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ference. The entire quantity of lands was, under the contract with the commissioners, the consideration for the building of the entire road. It might well be that upon examination it would appear that the first thirty or forty miles of the road would earn by far the most valuable lands, or would cost much less to construct, leaving the remainder a less profitable undertaking; but this was guarded against by securing an entire contract, which was, of course, the vital and material thing to the state. If the tax exemption statute of 1867 was contractual at all, the assumption of this obligation to complete the road constituted an essential part of the consideration therefor. It was to protect that purpose that the contract provided that no one should be recognized as an assignee unless he obligated himself to the entire contract by giving bond for its performance. This is what Fletcher and Crowell distinctly refrained from doing in their transaction with Babcock. It was between them definitely specified that they should contribute toward only so much of the road as the three might decide to build. Under that contract they were at liberty to stop at the end of thirty, forty, or any other number of miles, take their three fourths of the land thereby earned, and leave the road uncompleted; thus evading the very purpose of the legislation and of the commissioners' contract with Babcock, with no possibility of redress against them. It is a fundamental rule that statutes granting exemptions or privileges shall be strictly construed against the grant. *Weston v. Shawano Co.* 44 Wis. 242, 256. It would, therefore, be our duty, if the question whether Fletcher and Crowell came within the terms of the act were doubtful, to adopt a construction which would exclude them. It is, however, unnecessary to apply that rule, as it is clear they were not assigns of the contract, either technically or in spirit.

Defendants' counsel contend, however, that whatever might be thought, as an original question, of the construction of

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this contract between Babcock, Fletcher, and Crowell, the acts of the governor, as evidenced by the patents, are conclusive — first, as a practical construction, and, secondly, as an estoppel. The recitations in those patents are, at best, ambiguous. The strongest expression in either of them is in the patent to Fletcher, which describes him as a partner. It is not, however, important to analyze these recitations, or to ascertain whether, if authorized, they have the effect contended for. It is the state of Wisconsin which must have given its assent to such a construction in order that it should have force either as evidence or by way of estoppel. The state of Wisconsin is a different thing from either the governor or the government of the state of Wisconsin. The act of the governor is the act of the state only when he is empowered by law to act for the state in that particular respect. His act, when not so authorized, is no more the act of the state than if done by a private individual. In *Poindexter v. Greenhow*, 114 U. S. 290, the court, in discussing the force of an act of legislature not authorized by the constitution, says: "In the discussion of such questions the distinction between the government of a state and the state itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as, ordinarily, the acts of the government are the acts of the state, because within the limits of its delegation of power, the government of the state is generally confounded with the state itself, and often the former is meant when the latter is mentioned. The state itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but, outside of that, it is a lawless usurpation."

Nowhere do we find any authority for the governor to make an agreement, or to modify one, with reference to these lands or the taxation thereof. The act of Congress

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vested their disposal in the legislature of Wisconsin. The legislature vested the power to make contracts in a commission, and not in the governor. The legislature itself exercised, and did not delegate to the governor, the power to exempt from taxation, and fixed the limits of such exemption. If this contract, specifying how assignment might be made, were not within the power of the governor to make, he, of course, had no authority to modify it, either directly or by declaring a construction. Nor could he, directly or by construction, modify the act of the legislature. The rights of the public or of the state are not to be affected or surrendered by any officer unless the authority to do so is conferred.

The result of these views is, of course, that the lands in question were not, after their conveyance to either Crowell or Fletcher, exempted from taxation by ch. 429, Laws of 1867; which disposes of the controversy as to the three-sixteenths share formerly owned by Crowell.

3. As to the nine-sixteenths interest derived by defendants from Fletcher, appellants claim that by virtue of the judgment in *Fletcher v. Coleman et al.*, in Oconto circuit court, the exemption from taxation of such interest while held by him under said act of 1867 is *res adjudicata* as against Coleman and as against the plaintiff, his grantee of the lands and assignee of the cause of action in suit here for trespasses committed while Coleman claimed to be owner. The rules governing the efficacy of judgments in subsequent litigation between parties and privies are well established, and may be formulated thus: In a second litigation between the same parties or privies upon the same cause of action, the judgment is absolutely final as to their rights in that cause of action as to all things, not only those which were in fact litigated and decided by the court, but also those which might have been so litigated and decided. On the other hand, in a subsequent litigation between the same

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parties or their privies upon a different cause of action, the judgment is only conclusive as to those issues which were in fact adjudicated. *Van Valkenburgh v. Milwaukee*, 43 Wis. 580; *Wentworth v. Racine Co.* 99 Wis. 26; *Cromwell v. Sac Co.* 94 U. S. 356; *Last Chance M. Co. v. Tyler M. Co.* 157 U. S. 683; *Southern P. R. Co. v. U. S.* 168 U. S. 1. To ascertain what those issues were, we may examine the proceedings, or extrinsic evidence may be considered. (Finding) *Last Chance M. Co. v. Tyler M. Co., supra;* (referee's finding) *Lumber Co. v. Buchtel*, 101 U. S. 638; (opinion) *Legrande v. Rixey's Adm'r*, 83 Va. 862, 867; (evidence) *Washington G. L. Co. v. District of Columbia*, 161 U. S. 316, 329.

The efficacy of the judgment is the same whether it be pleaded in bar or merely be offered in evidence, if it is material to the issues formed by the pleadings. If pleaded as an estoppel, it is effective as such. If offered as evidence, it is conclusive evidence of all matters so adjudicated and decided. Mr. Greenleaf (1 Ev. § 531) well says that, "where a former recovery is given in evidence, it is equally conclusive as if pleaded;" and this view is sustained by the great weight of the authorities, many of which are collected in the opinion in *Southern P. R. Co. v. U. S.* 168 U. S. 55–60. Indeed, in a litigation upon a different cause of action the prior judgment does not serve as an estoppel, but only as evidence; and when so offered it is conclusive evidence of the matters settled by it between the same parties. And, if such matters go in denial of the existence of any cause of action, they are admissible in evidence under the general denial. *Lombard v. McMillan*, 95 Wis. 627; *Carroll v. Fethers*, 102 Wis. 436. In the present case we have no extrinsic evidence as to the issues actually decided in *Fletcher v. Coleman*, but merely the complaint, the finding, and the judgment. The complaint asserts one ground of *exemption* from taxation, strictly so called, namely, that by virtue of ch. 429, P. & L. Laws of 1867, the lands in question were

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exempt from taxation in the hands of Fletcher as a contractor, or at least as an assignee of the contract, within the meaning of that act. It also asserts the *invalidity* of the tax certificates on the ground that the land was not within the power of assessment or levy by the officers of the town of Marinette; also for failure of assessors to view the lands, and failure of certain taxing officers to take statutory oaths. The finding is that all of the allegations of the complaint are true as alleged. While the case apparently was in default, it is also apparent from the finding that evidence was offered and considered by the court. Of course, upon such complaint and finding a mere judgment canceling the certificates would be inconclusive. It might rest upon any of the grounds above mentioned, and therefore would not *necessarily* rest upon any one of them. But the judgment decides, not alone that the certificates were void, but decrees "that all the land described in the patents issued by the state of Wisconsin to the above-named plaintiff [Fletcher] was exempt from taxation of all and every kind to the date of filing the complaint herein, viz. up to March, 1877." So far as the judgment extends beyond the date of the levy of the tax for the year 1875, it probably exceeds the relief prayed by the complaint, and therefore is ineffective; but it seems to be plain beyond dispute that the first point of defense to the taxes, raised by Fletcher's complaint in that action, was considered and adjudicated by the court. While matters are not to be presumed to have been adjudicated on mere conjecture or possibility, unless the fact clearly appears, yet writings in judicial proceedings must have reasonable construction, and their language be taken as significant. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 390.

The plaintiff, however, urges that, even if this construction be placed upon the judgment, and it be held that by virtue of ch. 429, Laws of 1867, the lands were exempt from taxes in 1875 in the hands of Fletcher, other considera-

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tions are now presented, which justify a different conclusion, which do not affirmatively appear to have been presented to or considered by the court in *Fletcher v. Coleman.* Those are stated to be: First. The amending act (ch. 219, P. & L. Laws of 1868), which, if effective, terminated the exemption on March 3, 1869, and which not being pleaded, the same may not have been before the court. Second. The facts with reference to the Hadley interest under a prior contract, and that the construction of ch. 429 was affected by the fact that certain acts in Hadley's behalf accompanied it through the legislature, indicating that all of the acts were introduced and carried through in the interests of Jackson Hadley as assignee of the Winslow road contract. Third. That it is not certain that the terms of the Babcock contract, containing the prohibition against assignment, were presented to or considered by the court in that case. Fourth. That it does not appear that the court had presented to it the fact, now found, that Fletcher acquired his interest in the lands for the timber thereon and for speculative purposes; nor that an undivided quarter of all the lands earned under the Babcock contract had been conveyed to Smith long prior to the levy of the taxes adjudged void.

No doubt the conclusiveness of a judgment is limited in subsequent litigation on a different cause of action to the issue actually decided, and a new or independent issue raised in second litigation is not concluded; but that does not mean that such conclusiveness is destroyed by the fact that a new and cogent argument is presented, which does not appear to have been urged or considered on the first hearing. If that were so, the employment of new counsel would almost invariably nullify the effect of *res adjudicata.* Nor can such conclusiveness be avoided by the presence of new or different evidence upon the same question. Thus, in *Van Valkenburgh v. Milwaukee,* 43 Wis. 580, the plaintiff's title to land was admitted in the first suit, and adjudged upon

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such admission. In the second defendant offered evidence to deny that title, which this court held could not be received to defeat the conclusiveness of the former judgment, although it had not been considered in reaching that decision, the issue, viz. plaintiff's ownership, being the same in both actions. As said in *Last Chance M. Co. v. Tyler M. Co.* 157 U. S. 683: "The question always is, Has there been such determination? and not upon what evidence or by what means it has been reached." The most extreme case which has been brought to our notice is that of *Boyd v. Alabama*, 94 U. S. 645, wherein an act of legislature, having once been sustained as a legal justification in a prosecution against defendant, was permitted in a second prosecution to be assailed as unconstitutional, it appearing that no such argument had been advanced in first case to defeat it. That case was one which appealed most strongly to one's regard for morality and public welfare. It has seldom been cited since, amid all the multitude of cases in the same court where the doctrine of *res adjudicata* has been considered and applied, and in which *Cromwell v. Sac Co.*, reported in the same volume, with opinion by the same justice, has been relied on. The reasons given, namely, that courts do not usually consider doubts of the power of the legislature unless pressed on their notice, and that numerous instances have occurred where an act has ultimately been declared unconstitutional, although the same court had repeatedly enforced it as valid, are very cogent considerations against applying the rule of *stare decisis*, but not for denying conclusiveness to a judgment between the same parties which could have been rendered only by holding or assuming the act to be valid. We are not inclined to so limit the conclusiveness of the thing adjudged as to permit its defeat by the presentation of a mere new argument necessarily, in effect, overruled by the previous decision, although not in fact urged thereon. The issue disposed of in *Fletcher v. Cole-*

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*man* was whether the lands in question were exempt from taxation, as late as 1875, in the hands of Fletcher. That issue involved, necessarily, the validity and continued force of ch. 429, P. & L. Laws of 1867, the construction of that act, the force and effect of the transactions and conveyances whereby Fletcher acquired his title, and the character of that title. All of the considerations urged by the respondent as novel in this case, which are material at all, are so only as argument or as evidence bearing upon the issue so previously determined. The only new issue presented is whether any material change of conditions occurred between the time of assessment and levy for 1875 and those of 1876, the negative of which is fully established. We see no escape from the conclusion, therefore, that the absolute exemption from taxation in 1876 of these lands is *res adjudicata* between Fletcher and Coleman and those in privity with them. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 395.

The next question is whether the plaintiff is in privity with any of the parties to the action of *Fletcher v. Coleman et al.* as to the rights of property presented in this action. It should be remembered that this action is to recover damages for a trespass committed upon certain lands while the same were claimed to be owned by Coleman, who was a party defendant to that action. The general rule governing privity is reiterated in nearly all of the authorities as "mutual or successive relationship to the same rights of property." Those "who claim under or in the right of a party" are privies. The respondent urges as the essentials of privity, first, successive relationship to the same rights of property, and that a relation of privity is a relation of dependence, not independence or superiority; and applies these tests to a discussion of the fact that the plaintiff is not claiming under the same tax certificates as were adjudged void in the former action. This argument is a confusion of ideas. Strictly speaking, the right of property

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claimed by the plaintiff in this action is the right of recovery accruing to Coleman by reason of the trespasses alleged. It is not even so far back as the right of property which Coleman at that time had in the lands themselves, but as to either of these rights of property there is obviously succession from Coleman to the plaintiff, and the relation of the plaintiff thereto is that of dependence upon the right which Coleman had. He has no other right whatever save that which Coleman has conveyed to him.

The following are some illustrative cases of privity, one or two of them taken from respondent's brief: *Finney v. Boyd*, 26 Wis. 366; *Warner v. Trow*, 36 Wis. 195; *Lawrence v. Milwaukee*, 45 Wis. 306; *Masten v. Olcott*, 101 N. Y. 152; *Lipscomb v. Postell*, 38 Miss. 476; *Porter v. Bagby*, 50 Kan. 412; *Lea v. Deakin*, 11 Biss. 23. The true question is whether, by virtue of the judgment above mentioned, facts establishing invalidity of Coleman's title as against the defendants were *res adjudicata* at the time of the alleged trespass, so that, if he had brought suit therefor, that judgment would have been admissible against him; and, if so, whether plaintiff is so in privity with him as to the right of action for that trespass that he is affected by the same facts, and, if so, bound by the adjudication thereof. The statement of the question seems to answer it. True, the source of Coleman's title was not the identical certificates adjudged void in *Fletcher v. Coleman*. If it were, we should be trying practically the same cause of action as in that former case. But as between him and Fletcher, or Fletcher's privies, the same facts and rules of law which rendered void the certificates involved in the former suit rendered invalid his title at the time of the trespass in 1894 and 1895. Had he brought suit for the trespass, he would at once have been met with an adjudication, in a suit to which he was a party, that the lands which he claimed to own were exempt from taxation, just as much in 1876 as in 1875 and earlier years;

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from which must have resulted a judgment that he had no right of action against the parties committing the trespass. The plaintiff stands here claiming to maintain this suit, not by virtue of his subsequent acquisition of the lands, whatever his title thereto may be, but because Coleman has assigned to him his right of action for the trespass, which he might just as well have done without transferring the lands to him at all. It is difficult to imagine a more complete instance of identity and succession of rights than that arising from the mere transfer of a cause of action in tort. The assignee thereof must stand exactly in the shoes of his assignor, and no enlargement of the rights of the latter can be successfully claimed by the assignee.

To test the mutuality of this estoppel, suppose that the judgment in *Fletcher v. Coleman* had gone the other way, and these lands had been adjudged to be subject to assessment, and, the certificates involved in that suit having been redeemed, Coleman had thereupon obtained title, as now, upon the certificates for the tax of 1876, can there be any doubt that the judgment would have been *res adjudicata* in favor of Coleman or of this plaintiff, had the same grantees of Fletcher committed this trespass, and plaintiff had sued thereon, and been met with the former claim of exemption from taxation in 1876? If such an adjudication could have been invoked by the plaintiff in such case as against these defendants, the adjudication, having gone the other way, is equally available to the defendants against the plaintiff.

The argument of counsel that privity is predicated upon rights of property, and not upon persons, is a partial statement of the rule as applied to the case presented here. The conclusive effect of a judgment is against the parties thereto personally whenever the matter adjudicated again becomes material between them, and that personal effect attaches itself to any property or rights of such individuals when brought into litigation, and follows such property or rights

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into the hands of a grantee or transferee thereof. It is not essential to the conclusiveness of the issues decided in *Fletcher v. Coleman* that we should find united the person Coleman and the particular tax certificates there adjudicated upon. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 395; *Southern P. R. Co. v. U. S.* 168 U. S. 54. It is sufficient that we find Coleman claiming any rights which are dependent upon facts or law so adjudicated. And that condition of things did exist at the time the alleged trespasses were committed, and such conclusiveness is transmitted from him to his successor, or dependent, or grantee, the plaintiff, claiming the same right of action by virtue of Coleman's transfer. *Porter v. Bagby*, 50 Kan. 412.

To summarize our conclusions, therefore, we hold: First. That the town of Marinette, in 1876, was not illegal for want of contiguity; that the lands in question were within the taxing jurisdiction of its town officers; and that the assessments on none of the lands were void for that reason. Second. That Crowell was not a contractor, nor assignee of the contractor, within the meaning of ch. 429, Laws of 1867; and that the share of the lands owned by him was not exempt from taxation in 1876. Third. That by the judgment in the suit of *Fletcher v. Coleman* the exemption of the portion of the lands owned by Fletcher from taxation in 1876 is *res adjudicata* as against this plaintiff and in favor of these defendants in this action. And, as a general conclusion, that plaintiff is entitled to recover for the trespasses upon the lands involved in the third and fourth causes of action and for one fourth (Crowell's share) of the damages for the trespass upon the lands described in the first and second causes of action, but is not entitled to recover the remaining three fourths (Fletcher's interest) of the stipulated damages for the trespass on said last-mentioned lands. The plaintiff should have recovered, therefore, $5,000 damages, while $7,500 of the damages which he did recover were improper. The

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judgment of the circuit court should be reduced from $12,500 to $5,000. Appellants should recover costs in this action.

*By the Court.*— The judgment of the circuit court is modified by reducing the recovery of damages therein to $5,000, and, as so modified, is affirmed.

CASSODAY, C. J., took no part.

Both parties moved for a rehearing.

For the appellants there was a brief by *Hooper & Hooper.*

For the respondent there was a brief by *Greene, Vroman & Fairchild.*

The motion was granted June 2, 1899, and the cause was reargued September 11, 12, 1899.

For the appellants there were briefs by *Hooper & Hooper,* and oral argument by *Moses Hooper* and *E. C. Eastman.*

*H. O. Fairchild,* of counsel, for the respondent.

The following opinion was filed October 20, 1899:

WINSLOW, J. Motions for rehearing were made in the present case by both parties, and upon consideration a rehearing was ordered upon the single question of the effect of the judgment in the case of *Fletcher v. Coleman.* It was, in effect, assumed in the former opinion that it appeared in the case of *Fletcher v. Coleman* that Coleman held or claimed to hold tax certificates upon the lands included in the first and second causes of action in this case, and hence that it appeared affirmatively from the record that the judgment in that case necessarily decided, as between Fletcher and Coleman, that Coleman's certificates thereon were void, because the lands were exempt from taxation in the year 1875. In justice to ourselves, it ought to be said that this assumption was entirely justified by the original briefs furnished us and the oral arguments made upon the first hearing. Upon the respondent's motion for rehearing, however, it

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was urged (as the fact is) that two classes of lands were involved in the prior action, which were described in two exhibits attached to the complaint: Exhibit A covering lands earned in 1867, upon which Fletcher already held patents (which include the lands now under consideration); and Exhibit B covering lands which had not yet been patented, but which were alleged to have been earned in 1868, and of which the state was alleged to hold title in trust for Fletcher, and which are not involved in the present litigation. In connection with this fact, our attention was called to the further fact that the complaint in the prior action did not specifically charge that Coleman possessed any certificates upon the lands now involved, or upon *any* definite parcels of land, but simply charged that there had been tax sales of all the lands of both classes, and certificates issued thereon, "which certificates now belong to said county, or to some of the defendants, and some of which certificates belong to each of the defendants in this action; but which of such certificates belong to said county and which to the other defendants this plaintiff cannot state." No evidence having been preserved in the record of that case, and the finding being simply a general one to the effect that all the allegations of the complaint were true, and that the lands described in two certain patents executed by the state to Fletcher were exempt from taxation, the argument of the respondent was that it does not appear that the question whether the lands described in the first and second causes of action in the present action were exempt was ever in fact litigated or decided as between Fletcher and Coleman. It was admitted by respondent that the lands in question here were included in the first patent named in that judgment, and were the lands described in Exhibit A in that case; but, it appearing by the findings that the second patent was issued after the commencement of that action, and covered lands patented in lieu of the lands alleged to have been

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earned in 1868, and described in Exhibit B, the argument was also made that, the patents not being before the court, the judgment did not in fact adjudicate as to the lands described in Exhibit B at all, and that the certificates held by Coleman might well have covered only lands named in Exhibit B, as to which lands there never had been any judgment of exemption. The considerations thus urged seemed so important, and their bearing upon the case so obvious, that it was deemed best to order a reargument of the question as to the conclusiveness of the prior judgment, in order that the questions now suggested might receive full argument and consideration. Such reargument has now been had, and, as a result, it seems necessary to reverse our former judgment.

The general principles governing the efficacy of judgments between parties and their privies were well stated in the former opinion, and we do not find it necessary to rediscuss or criticise them. Those principles are there stated as follows: "In a second litigation between the same parties or privies upon the same cause of action the judgment is absolutely final as to their rights in that cause of action as to all things, not only those which were in fact litigated and decided by the court, but also those which might have been so litigated and decided. On the other hand, in a subsequent litigation between the same parties or their privies upon a different cause of action the judgment is only conclusive as to those issues which were in fact adjudicated. . . . To ascertain what those issues were, we may examine the proceedings, or extrinsic evidence may be considered." In discussing the question of privity, however, the following language was used: "The conclusive effect of a judgment is against the parties thereto personally whenever the matter adjudicated again becomes material between them, *and that personal effect attaches itself to any property or rights of such individuals when brought into litigation, and follows such*

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*property or rights into the hands of a grantee or transferee thereof.*" We are all agreed that so much of the above paragraph as states that the effect of a personal estoppel follows *any* property or rights into the hands of a grantee or transferee of such property is incorrect, and must be withdrawn. It is only when the particular property or right which has been transferred is affirmatively shown to have been the subject matter of the former litigation, and its status settled thereby, that the effect of that litigation is conclusive upon a grantee or transferee of property. A mere personal estoppel does not travel with all property which the person estopped may afterwards transfer, but only with the property shown to have been in litigation, and afterwards transferred. *Hart v. Moulton*, *post*, p. 349. In the case just cited it is said: "The mere personal effect of the judgment is absolutely confined to the parties to the litigation. It does not attach to or become a rule of property as to any other thing than the particular subject of the controversy which was closed by the judgment." Granting, for the purpose of the argument, that the plaintiff here is in privity with Coleman, it seems very apparent, under the foregoing rules, that the evidence does not go far enough to show that the judgment in the case of *Fletcher v. Coleman* concludes the plaintiff, or in any way affects his title to the lands included in the first and second causes of action here. The present cause of action being an entirely different one from that involved in *Fletcher v. Coleman*, the judgment is only conclusive as to those issues which affirmatively appear to have been in fact adjudicated in that case. It nowhere appears, either by the record of that case or by extrinsic evidence, that it was there decided (as between Fletcher and Coleman) that the lands here involved were exempt from taxation, because it does not appear that Coleman then had, or claimed to have, any tax certificates upon these lands. His certificates, if he held any, may just as well have been upon



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the lands described in Exhibit B, which are not involved in this action, and which appear to have never been adjudicated on at all. Perhaps, as to Coleman himself, the question was decided that the lands in Exhibit A were exempt from taxation, so that he would be personally estopped from contending to the contrary in subsequent litigation with Fletcher; but it does not appear that either the land in controversy here or any tax certificates on that land were the subject of controversy between Fletcher and Coleman in that case, and hence that judgment did not attach to any land so as to conclude one who subsequently purchased from Coleman. This consideration makes the estoppel raised by the former adjudication, if any there was, a mere personal estoppel as to Coleman, and one which is not attached to any property; and hence, when Coleman afterwards conveyed the Webster title to the plaintiff, it passed unaffected by the prior judgment. This conclusion is decisive of this branch of the case, because the parties in the present case by stipulation (now for the first time called specifically to our attention) have stipulated that, "if the plaintiff's title to the lands described in the first and second causes of action is found to be valid, he is entitled to recover for damages under said first and second causes of action the sum of ten thousand dollars." The parties having chosen to rest the right of recovery upon the question of title to the land on which the trespass was committed, we are relieved from considering the question whether Coleman, if personally estopped, could, by assignment, transfer a cause of action for trespass thereon which could be recovered upon in the hands of his assignee.

Another position was taken by the plaintiff, and argued, namely, that, even conceding that the judgment in the prior action estopped Coleman and his grantees, who claimed under a title founded on the certificates attacked in that action, still such estoppel could have no effect upon the Web-

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ster title, which simply passed through Coleman to the plaintiff, and which is conceded to have been a good title, and one which is founded upon certificates of a subsequent year. In the view we have taken of the case, we have found it unnecessary to discuss this question.

*By the Court.*— Judgment affirmed.

CASSODAY, C. J., took no part.

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## THE STATE EX REL. MEGGETT vs. O'NEILL, Circuit Judge.

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*September 13 — October 20, 1899.*

*Appealable order: Contempt: Civil or criminal?* Certiorari: *Supreme court.*

1. A final order in a civil contempt proceeding is one affecting a substantial right made in a special proceeding, and is therefore appealable.
2. Where the act charged as contempt is the nonpayment of money to another party, and the remedy prayed and granted is the compulsion of such payment by arrest and imprisonment until it is done, the proceeding is civil in its character.
3. The supreme court will refuse to review by *certiorari* appealable orders and judgments, except in emergencies in which the remedy by appeal is inadequate.

CERTIORARI to review proceedings of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. The respondent moved to quash the writ. *Motion granted.*

A writ of *certiorari* having been issued to review certain contempt proceedings and order or judgment against the relator, and return thereto having been made, the respondent moved to quash the writ. From the record it appears that prior to 1893 an action to foreclose a mortgage was pending, wherein Herbert Nash, as trustee, was plaintiff, and the re-

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lator was the principal defendant; that on December 30, 1893, in said action, the court entered an injunctional order, among other things prohibiting the relator from interfering with the mortgaged property or collecting any rents thereof, which injunctional order was duly served on the relator; that after such service the relator did collect rents amounting to $114.83, which, notwithstanding repeated demands, he failed and neglected to pay over to the receiver appointed in said action. In June, 1898, there was issued an order to show cause why the relator should not be punished for contempt for his disobedience of said injunction. Upon that order to show cause affidavits were introduced on both sides, an issue of fact joined, and testimony taken thereon, and on August 5th an order was made adjudging the relator guilty of wilful contempt of court in collecting said rents, and that said relator forthwith pay to the plaintiff or his attorney, L. A. Doolittle, the sum so collected, with interest and costs. On September 29th proof was made to the court by affidavit of demand and refusal of the relator to pay, whereupon the court entered an order adjudging the relator guilty of contempt in having wilfully disobeyed the order made by the court on the 5th of August in neglecting and refusing to pay said moneys; that said misconduct was calculated to, and actually did, defeat, impair, and prejudice the rights and remedies of the plaintiff; and that as punishment for said contempt the said *Alexander Meggett* be committed by the sheriff to the common jail, to be detained and imprisoned until he shall have obeyed the order of August 5th by paying the sums therein specified; whereupon warrant issued, *Meggett* was arrested, gave bond for the jail limits, and has continued so imprisoned ever since. He has made two motions to vacate said order of imprisonment,— one based simply on the record, the other based on the record and on the additional fact that thereafter he had been discharged in bankruptcy from his debts; among other facts it appearing

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that relator has had an income from a federal office exceeding $1,500 per year. Both of those orders were denied by the court below. So far as appears, no appeal has been taken or attempted from any of the above-mentioned orders.

*W. F. Bailey*, for the relator.

*L. A. Doolittle*, for the respondent.

DODGE, J. A final order in a civil contempt proceeding is appealable as being one affecting a substantial right in a special proceeding. *Shannon v. State*, 18 Wis. 604; *Witter v. Lyon*, 34 Wis. 564; *In re Day*, 34 Wis. 638. The proceeding assailed was civil and not criminal. The two are distinguished, as are actions, by the character of the rights to be vindicated and the remedy sought. A civil proceeding is one the purpose of which is to redress private grievances and to enforce or protect private rights; while a criminal proceeding is to punish an affront to public rights, namely, the authority and dignity of the court. The order or judgment sought and pronounced is a most cogent consideration in identifying the one or the other. *State ex rel. Chappell v. Giles*, 10 Wis. 101; *Shannon v. State, supra; In re Day*, 34 Wis. 638; *In re Murphey*, 39 Wis. 286; *In re Pierce*, 44 Wis. 411; Rapalje, Contempt, § 21. Where the act charged as contempt is the nonpayment of money to another party, and the remedy prayed and granted is the compulsion of such payment by arrest and imprisonment until it is done, there can be no doubt that the proceeding is civil in its character. Whether or not the same act might also support a criminal proceeding on behalf of the state, having for its only purpose punishment for the defiance of the court's authority, we need not decide; the proceeding cannot serve both purposes (*In re Pierce, supra*); and in the record before us the private end and civil character is clearly dominant. This court has repeatedly declared its policy to refuse to review by *certiorari* appealable orders or judgments. *State*

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*ex rel. C. & N. W. R. Co. v. O., A. & B. W. R. Co.* 100 Wis. 538; Harris, Certiorari, §§ 44, 87. This rule of policy is not predicated upon any lack of jurisdiction or of power, but upon the idea that the primary function of this court is appellate, and that its powers of superintending control over other courts, like its other original jurisdiction, are "not to be exercised upon light occasion, or when other and ordinary remedies are sufficient," as expressed by Mr. Justice WINSLOW in *State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 591. As the ordinary appellate revisory powers of this court have been found sufficient in the past, with extremely rare exceptions, it is believed that in the future emergencies transcending their sufficiency will seldom occur. The record before us does not invite the exercise of the unusual power called into operation in *State ex rel. Fourth Nat. Bank v. Johnson, supra;* it presents a pertinacity in contempt on the part of the relator seldom equaled, and, further, exhibits an entire and unexcused neglect to present those questions of jurisdiction and of error now urged, by appeal, where they might all have been considered and any injustice corrected. In the light of these facts, now more fully brought before us by the return, we are convinced that no proper case is presented for review of the proceedings upon this writ.

*By the Court.*— Let the writ of *certiorari* be quashed.

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PERUGI, Plaintiff in error, vs. THE STATE, Defendant in error.

*September 13 — October 20, 1899.*

*Criminal law and practice: Murder: Self-defense: Instructions to jury: Degrees: Cause of death: Premeditated design.*

1. On a prosecution for murder where it was claimed that the killing was done in self-defense, the disparity in size of the parties was important only in determining what an ordinarily prudent man in

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the position of the accused would have done under all the circumstances; and where these considerations were fully submitted to the jury it was not a prejudicial error to refuse an instruction that "in the assault of a powerful man upon a weaker the necessity of taking life in self-defense will be more easily discoverable than in an attack by one man under equal circumstances."

2. A refusal to charge that the law does not require an assaulted party to call upon bystanders before resisting an attack was not error, where upon the evidence there was no necessity for such an instruction, and full instructions on the law of self-defense, covering every phase of the testimony, were given.

3. The fact that just before the killing the deceased had "tried to grab" the accused while they were at a table in a saloon did not require the court to submit to the jury the question whether the killing was manslaughter in the second degree (Stats. 1898, sec. 4351), where all the circumstances and the accused's own testimony showed that the shooting was not done in resisting such assault.

4. Where the evidence fails to show that there was any "heat of passion," the court need not submit the question whether the killing was manslaughter in the third or fourth degree.

5. Where the evidence was undisputed that defendant shot the deceased, the bullet lodging in the spinal column and injuring it to such an extent that the wound was necessarily fatal, it was not error for the court to state that it appeared beyond question that defendant inflicted upon the deceased "a dangerous wound, from which death ensued eleven days thereafter," although the immediate cause of death was the shock resulting from an operation which was deemed advisable by the attending surgeons.

6. Every homicide, not justifiable or excusable, perpetrated in pursuance of a previous intention to kill distinctly formed in the slayer's mind, is murder in the first degree, even though the killing follows instantly the formation of such intention. *Terrill v. State*, 95 Wis. 276, and *Sullivan v. State*, 100 Wis. 283, so far as they conflict with this doctrine, overruled.

ERROR to review a judgment of the municipal court of the city and county of Milwaukee: EMIL WALLBER, Judge. *Affirmed.*

For the plaintiff in error there was a brief by *Carroll & Carroll*, and oral argument by *W. J. Carroll.*

For the defendant in error there was a brief by the *Attorney General*, and a separate brief by *A. C. Brazee*, district

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attorney, and *A. C. Umbreit*, assistant district attorney, and the cause was argued orally by *Mr. Umbreit* and *Mr. E. N. Warner*, law examiner.

BARDEEN, J. The plaintiff in error was convicted of murder in the first degree, and sent to state prison for life. He now seeks to have such conviction reviewed by this court on the ground of certain alleged errors in refusing to instruct, and in misdirection of, the jury.

1. The principal ground of defense was that the killing was done in self-defense. Counsel for the accused asked the court to instruct the jury as follows: "You are instructed that the law is that in the assault of a powerful man upon a weaker the necessity of taking life in self-defense will be more easily discoverable than in an attack by one man under equal circumstances, and the probable ability to defend without fatal recourse must depend upon the means and power of defense in the assaulted person." This request was refused. The propriety of such an instruction must depend upon the character of the assault and the attendant circumstances. A homicide is justifiable, under the statute, when committed in the lawful defense of the person of the slayer, "when there shall be reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be reasonable cause for believing that there is imminent danger of such design being accomplished." This instruction assumes that an assault had been made,—a question that will be treated in another branch of this opinion. But, admitting that an assault had been made by deceased, the question of disparity in size of the parties did not justify a killing unless both conditions of the statute are met by the surrounding circumstances. The comparative size of the parties is only important in determining what an ordinarily prudent man would have done in the position of the accused, hearing what he had heard, seeing what he

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saw, knowing what he knew, and standing where he stood. All of these considerations were submitted to the jury in the general charge, and we are unable to see how the defendant could have been prejudiced by the refusal to submit this instruction.

2. Another error is said to have resulted in the refusal of the court to charge the jury that the law does not require an assaulted party to call upon bystanders before resisting an attack. The evidence fails to disclose any necessity for such an instruction. The court gave full and complete instructions on the law of self-defense, covering every phase of the testimony, and as favorable to defendant as due regard for the law and the facts would warrant.

3. The court submitted to the jury the question of defendant's guilt of murder in the first and second degrees, and refused to submit either the second, third, or fourth degrees of manslaughter, as requested by the accused.

Manslaughter in the second degree is where one unnecessarily kills another while resisting an attempt by such other person to commit any felony, or do any other unlawful act, or after such attempt has failed. Stats. 1898, sec. 4351.

The very essence of this degree of homicide is that the killing should be *unnecessarily* done, and done while resisting an attempt to commit a felony, or while resisting an attempt to do any other unlawful act, or after such attempt shall have failed. There is no pretense in this case that the deceased was killed while attempting to commit a felony. It is insisted, however, that such killing was done while accused was resisting an assault made upon him by deceased. In this view of the case, we have read the testimony with the most careful scrutiny. The fracas occurred in a saloon. The parties had been singing, eating, and drinking together for several hours. They were partially intoxicated. Mrs. Martino, the wife of the saloon keeper, was present, and her attention was directly attracted to the parties. Other witnesses were also present, and saw and heard all that oc-

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curred. Not one of them, even under a close and sharp cross-examination, would testify that any assault was made by deceased. All the evidence upon which the claim of an assault is based came from the accused. On direct examination he testified as follows: "Dencie said: 'No, you cannot be like me. I am better than you every time and every way. I am a Sicilian. I am from the hot kind — what you call it — hot kind. I am better than you any way.' *And he got up, and he try to make a grab on me.* He had his coat on his hand, standing in this way [indicating]. I was the other side of the table. *He got up and tried to grab me.* He told me: 'Yes, I am better than you every way. If you have anything to say, come outside. I kick your head off.' When I see he tried to grab me, I skipped behind Mrs. Martino. I said, 'Do you mean that?' and he said 'Yes,' and struck his hand on the table, and on the impulse of the moment I pulled the gun and shot him. . . . I had no ill feeling towards him. I shot him because he tell me he kick my head off. He was big enough to kick me. Once he told me I don't get a chance, and I was afraid he was going to kill me, because he told me once." On cross-examination he says that Dencie made some slurring remarks about the Catholic church, and cursed the Madonna, and that when he said that he pulled his revolver and shot him.

Looking at the evidence as a whole, and considering it in the light most favorable to the accused, we are unable to discover anything in it that would warrant the court in submitting this degree of homicide to the jury. Admitting that the deceased "made a grab" at him while they were at the table, all of the circumstances and the accused's own testimony show that the shooting was not done in resisting such assault. As stated in *Fertig v. State*, 100 Wis. 301: "It is only where there is evidence tending to establish a particular offense of criminal homicide that the trial court is required to instruct the jury in regard to it."

Manslaughter in the third degree is where one kills an-

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other in the *heat of passion*, without design to effect death, by a dangerous weapon. Stats. 1898, sec. 4354. A full and complete answer to the contention that this degree of homicide should have been submitted to the jury is found in the testimony of the accused. He says: "I was not mad or angry at him at all. That night I was not mad at him. I had no hard feeling towards him, and not angry in the least bit. *I knew what I was doing.*" The evidence failing to show the element of heat of passion, there was no foundation upon which to base a submission of this degree of homicide to the jury.

The same element is necessary in manslaughter in the fourth degree, and the court was fully warranted in refusing to submit it.

4. In making a statement of the facts in the case, the court made use of the following language: "It appears beyond question that on the 15th day of April, 1898, in the saloon of John Martino, located at 137 Huron street in this city, the defendant discharged a loaded revolver at Peter Dencie, inflicting upon said Dencie a dangerous wound, from which death ensued eleven days thereafter." This is said to have been error, because "the point whether such wound was dangerous, and whether death resulted eleven days thereafter from such wound, was a disputed and strongly contested question of fact" on the trial. That question may have been strongly contested, but the evidence in regard to it was all one way. Dr. Sifton, the surgeon in charge, and the one who conducted the post-mortem examination, described the wound and his treatment of it. An X-ray examination was made, and the bullet was found to have lodged in the spinal column, at the fourth dorsal vertebra. The conditions were such that an operation was deemed advisable. The doctor testified: "The immediate cause of his death was the shock resulting after the operation. The cause of that shock, and for which the operation was done,

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was the gunshot injury, which would have necessarily been fatal. I found the spinal cord injured; certain columns degenerated; gross lesions of the cord could be seen. . . . From my experience as a physician, and knowledge, the man could not recover, as the wound was fatal." No physician disputed the existence of the conditions found by Dr. Sifton, and all admit that, if such conditions existed, the wound was necessarily fatal. The court was amply justified in making the statement quoted. See *Sharp v. State*, 51 Ark. 149.

5. We now come to a branch of the case that has given us considerable trouble. The court gave the following instructions to the jury, which were duly excepted to: "To constitute a murder in the first degree, the killing must have been done wilfully, deliberately, and with premeditation; that is, intentionally, sanely, and with prior deliberation, and without legal excuse or justification. 'Wilfully,' as used in the information and these instructions, means intentionally; that is, not accidentally. 'Deliberately' means an intent to kill, executed by the slayer in a cool state of the blood, in furtherance of a former design, to gratify a feeling of revenge or accomplish some other unlawful purpose, and not under the influence of a violent passion, aroused by real or supposed grievance, amounting to a temporary dethronement of reason. 'Premeditated design to kill' means a previously formed intention to kill. But while the law requires, in order to constitute murder in the first degree, that the killing should be wilful, deliberate, and premeditated, still it does not require that the wilful intent, premeditation, or deliberation shall exist for any particular length of time before the crime is committed. It is not necessary that the killing should have been considered, brooded over, or reflected upon for a week, a day, or an hour. It is sufficient if there was a design and a determination to kill, distinctly formed in the slayer's mind at any moment before

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or at the time the shot was fired which caused the death of the person killed. There may be no appreciable space of time between the intent to kill and the act of killing, and if sufficient deliberation was had to form a design or purpose to take life, and to put that design or purpose into execution by destroying life, then there was, in law, sufficient deliberation to constitute murder in the first degree, no matter whether the design to take life had been for a long time contemplated by the slayer, or whether the design to kill was formed by him at the instant of the fatal shot. It is enough that the intention to kill preceded the fatal act although the act followed instantly."

These instructions are attacked as laying down a rule wholly at variance with the decision of this court in the recent case of *Terrill v. State*, 95 Wis. 276, followed in *Sullivan v. State*, 100 Wis. 283. The importance of this contention has induced us not only to review the two cases mentioned, but many former decisions of this court bearing thereon, as well as decisions of courts in other states with similar statutes. It is asserted that the decision in the *Terrill Case* was a surprise to many of the lawyers and judges of the state versed in criminal law. It was said to be a complete departure from the rule which had prevailed in this state for many years, and introduced into the administration of criminal justice difficulties not theretofore existing. In view of this situation, we have thought it the part of wisdom to again consider the grounds upon which it rests, and, if a mistake has been made, rectify it, and thus save future confusion and uncertainty. In the *Terrill Case* the court charged the jury that if, when the defendant shot deceased, "he did so pursuant to an *intent then distinctly formed* in his mind to kill," they could not find him guilty of manslaughter in the second degree, "for the defendant, in such case, if he killed Quirk from *premeditated design* to kill him, is guilty of murder in the first degree." This was given in qualification of an instruction submitting defendant's guilt

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of manslaughter in the second degree. The vice of this instruction is said to have consisted in the fact that it "wholly failed to distinguish between the intentional and unnecessary killing under the circumstances stated in sec. 4351 and a killing when perpetrated by premeditated design to effect the death of the person killed, which last is murder in the first degree." The result of the discussion which followed in the decision was that there might, under our statutes, be a *distinct* intent to kill under circumstances rendering the slayer guilty of felonious homicide, without the element of *premeditated design*, essential to murder in the first degree. The case principally relied upon to support this conclusion is *State v. Fee*, 19 Wis. 562, which was a case in which the validity of an indictment for assault with "intent to murder" was under consideration. The charge was laid in the language of the statute, and the court held that, inasmuch as the words "of his malice aforethought" were necessary in indictments for murder, an indictment for assault "with intent to murder" was bad without them. In the opinion it was also said: "In opposition to this view it is said that the words 'intent to kill or murder' excluded the idea of manslaughter, which is a killing without a design to effect death. But under our statutes (secs. 13, 21, ch. 164, R. S.) it is clear a person may *intentionally* take the life of another and be guilty of manslaughter, and that only." The statutes referred to are substantially the same as secs. 4351, 4363, Stats. 1898. The indictment was held good under another section of the statute, which provides a penalty for an assault with intent to commit manslaughter. In the subsequent case of *Kilkelly v. State*, 43 Wis. 604, this court abandoned the view held in the *Fee Case*, and held an indictment good that described the offense in the language used in the latter case, basing it upon the change made in the criminal laws of the state by ch. 137, Laws of 1871. See *Cross v. State*, 55 Wis. 261.

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So far as we are able to discover, that portion of the decision in the *Fee Case* which says that there might be an intentional killing, and the slayer only be guilty of manslaughter, was never brought to the attention of the court until the *Terrill Case* came up for consideration. In the meantime many cases of criminal homicide were brought to this court, in which the sufficiency of indictments and informations was considered, and where instructions given to juries were passed upon. In *Hogan v. State*, 36 Wis. 226, Chief Justice RYAN made a most careful and thoughtful review of our statutes relating to homicides, and laid down certain propositions which stood unchallenged for nearly a quarter of a century. Prior to its rendition, no decision had been made which attempted to cover the same ground. His elucidation of the law of murder in the first degree, and of the scope and meaning of the words used in the statute, has entered into and been adopted as the basis of hundreds of instructions to juries since that time. He stated that it was the policy of the statute to put all statutory murder with actual intent to kill in one degree by itself, and all statutory murders with constructive intent to kill in the lower degrees of crime. What was said in this case was clearly opposed to the expressions noted in the *Fee Case*, and made the facts clear that under our statutes all wilful homicides committed by a person with a design to kill — that is, with a purpose that was premeditated and distinctly formed — were murder in the first degree. Both the *Terrill* and *Sullivan Cases* are opposed to this doctrine, and there is some ground for the claim that they bring into the administration of criminal justice much confusion and many difficulties, best appreciated by those who preside in the trial courts. The fact is undoubted that since the decision in the *Hogan Case* the bench and bar of the state have understood that every homicide perpetrated pursuant to a previously formed intent to take human life, and not under

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such circumstances as to be justifiable or excusable, was murder in the first degree. In the case of *Roman v. State*, 41 Wis. 312, the court charged the jury as follows, and this court sustained the instruction: "The first inquiry, then, for you is, Was there in the mind of the defendant, at the time Magill was killed, a premeditated design to produce death? No matter what the provocation, no matter what the heat of passion, no matter what the other surroundings may be, unless the act was justifiable, if there was a premeditated design to produce death, it is murder in the first degree." A very similar instruction was approved in the case of *Clifford v. State*, 58 Wis. 477. No doubt there are other cases in this court to the same effect.

The general doctrine seems to prevail everywhere that when the specific intent to kill exists, previously formed, distinct, and settled in the mind, any killing done pursuant thereto is murder. 2 Bish. Cr. Law, § 695. The case of *People v. Lilley*, 43 Mich. 521, is instructive on this point, and directly in line with the cases cited in this state. It says, in effect, that there can be no specific intent without deliberation, and that an act done on a sudden impulse — like manslaughter — cannot be deliberate; that, while manslaughter often involves an intent to kill, the true rule is that reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of average disposition, liable to act rashly, or without due deliberation or reflection, and from passion rather than judgment; and that to reduce the act to manslaughter it must be done while reason is obscured by passion, so that the party acts rashly and without reflection. In New York, where the statutes are similar to ours, the rule is carried farther, and it is said that a homicide may only be classed as manslaughter when there is no design to kill, and that when the purpose to kill is present it is murder in one of its degrees. *People v. Beckwith*, 103 N. Y. 360. As early as 1847

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the courts of that state asserted the rule that the *intention* to take life constituted, under their statutes, the main distinction between murder and manslaughter; that, except in the one case when the homicide was committed by one engaged in committing a felony, no homicide was murder without an intention to kill; and with that intention, with the single exception mentioned, unless it be justifiable, it is murder, whether the intention is formed on the instant or had long been entertained. *People v. Austin*, 1 Parker, Cr. R. 154. In another and later case it is said: "If there be sufficient deliberation to form a design to take life, and to put the design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow or whether it be contemplated for months." The ultimate conclusion was that, if the intention to take life existed, it was murder. *People v. Clark*, 7 N. Y. 385. A similar proposition is approved in *People v. Hawkins*, 109 N. Y. 408.

We cannot resist the conclusion that every killing, not justifiable, done with that degree of deliberation and with an intent or design sufficiently fixed and settled in the mind as to come within the rule of "premeditated design" laid down in the statute and interpreted by the decisions of this court, is murder in the first degree; and any expression in the *Terrill Case* or the *Sullivan Case* to the contrary ought not to be adhered to. The intentional killing that may exist consistent with manslaughter in the second degree is the intent which springs from momentary impulse, when the mind is unbalanced, and there is no opportunity for consideration or deliberation.

Another difficulty with the *Terrill Case* is that this court seems to have failed to appreciate the force, scope, and effect of the language used by the trial judge. The instruction was: "If you are convinced by the evidence, beyond a reasonable doubt, that when he shot and killed Quirk he



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did so pursuant to an *intent, then distinctly formed in his mind*, to kill Quirk, you cannot lawfully find the defendant guilty of manslaughter in the second degree, for the defendant in such case, if he killed Quirk from *premeditated design* to kill him, is guilty of murder in the first degree." In the *Hogan Case* (36 Wis. 226) it was said that, "'Previously formed intent to kill' and 'premeditated design to effect death' are synonymous terms." And again: "We take the 'premeditated design' of our murder in the first degree to be simply an intent to kill. Design means intent, and both words essentially imply premeditation." Very similar expressions have been used in other jurisdictions. Intent means "that which is intended; purpose; aim; design; intention." Cent. Dict. The word "distinctly" is used as synonymous with clearly, explicitly, definitely, precisely, unmistakably. So, when the trial judge used the words, "intent then distinctly formed in his mind," and followed it with the words "premeditated design," is there any possibility that the jury could have mistaken his meaning? "Premeditate is to think of in advance; to determine upon beforehand; to intend; to design." And. Law Dict. The jury are presumed to know the usual and ordinary meaning of words, and, in view of the definitions given, there seems no escape from the conclusion that they understood the words "intent distinctly formed" to be the equivalent of "premeditated design."

It is but proper to say that Mr. Justice MARSHALL filed dissenting opinions in both the *Terrill* and *Sullivan Cases*, and that the views we have adopted are in harmony with the principles therein advocated by him.

What we have already said disposes of the objections raised to the portion of the charge first above quoted. The other criticisms to the charge are based upon the fact that the judge told the jury that the premeditated design need not have existed for any particular length of time, but it was sufficient if there was a design and determination to kill

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distinctly formed in the slayer's mind at any moment before the fatal shot was fired. There are many cases in the books where this question has been considered. Thus, in *Aszman v. State*, 8 L. R. A. 33, 123 Ind. 347, it is said: "When a homicide has been preceded by a concurrence of will with an intention to kill, and these are followed by a deliberate thought or premeditation, although they follow as instantaneously as successive thoughts can follow each other, the premeditator may be guilty of murder in the first degree." In *Killins v. State*, 28 Fla. 313, the court below charged the jury that "'premeditation' is defined as meaning intent before the act, but not necessarily existing any extended time before the act," and no fault was found with it in the appellate court. In Missouri "premeditated" is defined as "thought of beforehand for any length of time, however short." *State v. Harris*, 76 Mo. 361. We take the following from the syllabus to *Keenan v. Comm.* 44 Pa. St. 55: "The true criterion of the first degree in murder is the intent to take life. The deliberation and premeditation required by the statute is not upon the *intent*, but upon the *killing*. It is deliberation and premeditation enough to *form* the intent to kill, and not *upon* the intent after it has been formed. An intent distinctly formed even 'for a moment' before it is carried into act is enough." Quoting from *McDaniel v. Comm.* 77 Va. 281, we have the following: "The killing must be a predetermined killing upon consideration, and not a sudden killing upon the momentary excitement and impulse of passion; . . . and this design to kill need not have existed for any particular length of time. It may be formed at the moment of the commission of the act." In *Hawthorne v. State*, 58 Miss. 778, it is said that the "deliberate design" to effect death of their statute could be formed suddenly, and that the use of a deadly weapon to kill was presumptive evidence of such design. A recent case in Alabama contains the following discussion of the subject: "'Deliberate' and

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'premeditated,' as those words are used in the statute, mean only this: That the slayer must intend, before the blow is delivered, though it be but an instant of time before, that he will strike at the time he does strike, and that death will be the result of the blow; or, in other words, if the slayer had any time to think before the act, however short such time may have been,—even a single moment,—and did think, and he struck the blow as the result of an intention to kill by this momentary operation of the mind, and death ensued, that would be a deliberate and premeditated killing, within the meaning of the statute defining murder in the first degree." *Daughdrill v. State*, 113 Ala. 7. In New York the rule is thus stated in *People v. Clark*, 7 N. Y. 393: "If there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design is formed at the instant of striking the fatal blow or whether it be contemplated for months. It is enough that the intention precede the act, although that follows immediately." Judge DANFORTH, in *Leighton v. People*, 88 N. Y. 117, says: "If the killing is not the instant effect of impulse, if there is hesitation or doubt to overcome, choice made as the result of thought, however short the struggle between the intention and the act, it is sufficient to characterize the crime as deliberate and premeditated murder." Although apparently not intending to modify the rule, Judge EARL makes use of the following language in *People v. Majone*, 91 N. Y. 211: "Under the statute there must not be only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection or consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. The human mind acts with celerity, which it

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is sometimes impossible to measure; and whether a deliberate or premeditated design to kill was formed must be determined from all the circumstances of the case." Later cases on the same subject may be found cited in *People v. Constantino*, 153 N. Y. 24, and *People v. Decker*, 157 N. Y. 186. It will be noted that in the cases last above cited the statement is made that the "design must precede the killing by some appreciable space of time." Yet from the language that follows it is evident that it all depends upon the particular circumstances of the affray, and that, if there was time for the slayer to settle and fix upon a design or purpose to kill,— that is, for a choice to kill or not to kill,— the requirements of the statute have been met, although the formation of the design and the act follow instantaneously.

The case of *Hogan v. State*, before cited, and *Clifford v. State*, 58 Wis. 477, are closely in line with the authorities mentioned, and very many of the expressions excepted to in the judge's charge may be found in one or the other of these cases. What is there said fully meets the objections urged here, and it is not necessary to repeat it. The conclusions here reached are the result of a careful study of the facts in this case and of the law applicable thereto. The case seems to have been tried with due regard to the rights of the accused, the evidence is quite sufficient to warrant the conclusion arrived at by the jury, and the principles of law governing the case justly applied.

*By the Court.*— The judgment of the municipal court of Milwaukee county is affirmed.

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## THE STATE EX REL. OSHKOSH, ALGOMA & BLACK WOLF RAILROAD COMPANY vs. BURNELL, Circuit Judge.

*September 26 — October 20, 1899.*

*Railroads: Condemnation of crossing by electric road: Writ of assistance:* Mandamus.

A railroad company, incorporated under sec. 1820, Stats. 1898, for the purpose of carrying persons only, endeavored to condemn a right of way for a trolley electric line across the right of way of a steam railroad company, and prosecuted the proceedings to a successful termination in the circuit court. From the judgment of that court the steam railroad company appealed, and gave an undertaking to protect the petitioner from loss in case it should be finally determined that the petitioner was entitled to a crossing. Pending the appeal the petitioner applied for a writ of assistance to put it in possession of the crossing, and upon the writ being refused sought to compel its issuance by *mandamus*. No urgent necessity appearing why the crossing should be put in until the petitioner's right thereto was finally determined, the writ of *mandamus* is denied. In order to justify *mandamus* in such a case it must appear that the duty of the circuit court was plain, the refusal to perform it clear, the result of the refusal prejudicial, and the remedy by writ of error or appeal utterly inadequate.

MANDAMUS to GEO. W. BURNELL, judge of the circuit court for Winnebago county. *Peremptory writ denied.*

This is a *mandamus* action brought in this court, the object being to obtain a peremptory writ of *mandamus* requiring the respondent, as circuit judge, to enter an order in the circuit court for Winnebago county directing a writ of assistance to be issued to put the relator in possession of a crossing sixteen feet wide across the right of way of the Chicago & Northwestern Railway Company. The petition of the relator set forth, in detail, the proceedings, by which it appears that it had obtained condemnation of the sixteen-foot strip aforesaid, had paid the award of the commissioners in court, and, further, that the appeal from said award

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to the circuit court for Winnebago county had been dismissed; also that before bringing this proceeding it had applied to the circuit court for Winnebago county for a writ of assistance, and that such application had been denied. Upon this petition an alternative writ was issued, and upon the return thereof the respondent made his return, which return was not denied in any material aspect upon the hearing.

The facts which appeared by the petition and the return together are, in substance, that on the 8th day of July, 1898, the relator, which is a railway company incorporated under sec. 1820, Stats. 1898, for the purpose of carrying passengers only, commenced condemnation proceedings for the purpose of condemning a strip of land sixteen feet wide for right of way purposes across the right of way of the Chicago & Northwestern Railway Company. The Chicago & Northwestern Railway Company answered this petition, denying that the relator was a railroad corporation entitled to condemn such crossing. Upon the hearing of the petition, the prayer thereof was granted, and an order made appointing three commissioners to determine the question of the necessity of the taking of the land described in the petition, and to determine the points and manner of such crossing, and the amount of compensation to be paid therefor. Thereafter the commissioners met, and on the 30th day of January, 1899, filed their report, in which they determined that it is necessary for the petitioner to take, for right of way and crossing purposes, the strip of land sixteen feet wide (describing it) across the right of way of the Chicago & Northwestern Railway Company. The commissioners also determined the points and manner of the crossing to be made with overhead trolley wires, and fixed the amount of the compensation to be paid by the petitioner. Subsequently the Chicago & Northwestern Railway Company appealed from this report to the circuit court for Win-

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nebago county, and applied to that court for an order restraining the petitioner from putting in any crossing until such appeal was heard. This order was granted, upon the giving of an undertaking in the sum of $5,000, which was given. Subsequently the appeal came on to be heard in the circuit court, jury was waived, and the Chicago & Northwestern Railway Company claimed that the burden rested upon the petitioner to prove that it was necessary for it to condemn a crossing, because these proceedings were taken under sec. 1854, Stats. 1898, under which the question of the necessity of taking land was still open upon this appeal. This contention was overruled by the circuit court, which held that the affirmative was with the Chicago & Northwestern Railway Company.

The said railway company then moved the court to dismiss the petition and all proceedings under it, on the ground that the petitioner was not a corporation entitled to condemn lands, and that all proceedings theretofore had were void. This motion being denied, the Chicago & Northwestern Railway Company declined to introduce any evidence in the case, but made a further motion to dismiss the petition and proceedings because the petitioner is an electric railway, building tracks in the public streets for the purpose of carrying passengers only, and has no right to cross a public railroad by condemnation proceedings, and for other reasons which are not necessary to be here stated. This motion was also denied, and, no testimony being introduced, judgment was entered dismissing the railway company's appeal, and dissolving the injunctional order above mentioned, except that the same was to remain in full force for ten days, in order to enable the railway company to apply for a stay of proceedings. Thereupon the Chicago & Northwestern Railway Company immediately appealed, and gave notice thereof, and moved the circuit court for a continuance of the order pending such appeal, and the circuit

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court thereupon fixed the penalty of such undertaking at $15,000, and the condition thereof that, if the judgment or any part thereof be affirmed, said appellant should pay all costs and damages which might be awarded against it, and all which the said *Oshkosh, Algoma & Black Wolf Railroad Company* might sustain by reason of the continuance of the injunctional order. This undertaking was filed and approved by the court within the time required, to wit, on the 27th day of May, 1899.

On the 3d day of June, 1899, the *Oshkosh, Algoma & Black Wolf Railroad Company* applied to the circuit court for an order fixing the sum and effect of an undertaking to be given by it to abide and perform any final judgment which should be rendered in favor of said Chicago & Northwestern Railway Company upon its appeal, and for an order vacating and dissolving the injunctional order already entered. This motion was denied by the court, but the court fixed the amount of the bond at $15,000, in order that the same might be made, and the same was made and filed on the 10th of June, 1899, and approved as to form and sureties, but refused principally because of the grave character of the questions involved in the main case.

On the 23d of June, 1899, the petitioner here moved for a writ of assistance, which motion was denied by the circuit court.

For the relator there was a brief by *Miller, Noyes, Miller & Wahl*, and oral argument by *Geo. H. Noyes*.

*E. M. Hyzer*, for the respondent. [No brief on file.]

WINSLOW, J. It appears pretty clearly from the petition and return in this case that there are some serious questions which will be presented upon the hearing of the appeal from the final judgment below, when that appeal is reached. We shall express no view on these questions now, save that they are questions of importance. It appears that a railway com-

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pany, incorporated under sec. 1820, Stats. 1898, for the purpose of carrying persons only, endeavored to condemn a right of way for a trolley electric line across the right of way of the Chicago & Northwestern Railway Company, and at the same time to compel the joint construction of a crossing. The condemnation proceedings have been carried successfully through the circuit court, the amount awarded by the commissioners has been deposited in court, and judgment entered in the circuit court dismissing the appeal of the Chicago & Northwestern Railway Company to that court. From this judgment an appeal has been taken to this court. The petitioner claims that it has now an absolute right to a writ of assistance, under sec. 1850, Stats. 1898; that this proceeding was really a proceeding to force a crossing, under subd. 6, sec. 1828, Stats. 1898, and that the right to a crossing is absolute; hence that a writ of assistance should at once issue, and that the circuit court, in refusing the writ pending the appeal, has refused to perform a clear duty. On the other hand, the claim by the Chicago & Northwestern Railway Company is that, if the proceedings are of any validity at all, they are proceedings by one railroad company to condemn lands of another, and that under sec. 1854, Stats. 1898, in such cases the question of the necessity of taking the land is open for retrial in the circuit court, and that no crossing should be forced, by means of which a street railway will cross a steam railway on grade, until the question of the right to cross is finally settled.

This view was adopted by the circuit judge, and we think with good reason. The questions here presented are quite important to the public at large as well as to the corporations themselves. The multiplication of grade crossings over important railway lines is not desirable. No urgent necessity appears why this crossing should be put in until this litigation is terminated and the right to a crossing finally determined. The Chicago & Northwestern Railway Company

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has given a sufficient undertaking to protect the petitioner from loss in case it should be finally determined that the petitioner is entitled to a crossing. In order to justify *mandamus* in such a case as the present, it must appear that the duty of the court below was plain, the refusal to perform such duty clear, the result of the refusal prejudicial, and the remedy by writ of error or appeal utterly inadequate. *State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 591. We cannot say, upon the papers before us, that it is plain that it was the duty of the court to award a writ of assistance, nor can we say that there is any emergency calling for immediate action, or that the remedy by appeal or writ of error is not entirely sufficient. The questions involved deserve that careful consideration which they will receive upon the hearing of the appeal upon the merits but cannot well receive upon a summary proceeding of this nature. Were we to take them up and decide them now, we should be causing the writ of *mandamus* to serve the purpose of a writ of error or appeal, which has never been the policy of this court.

*By the Court.*— The peremptory writ is denied.

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WALTERS, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant. 104 115 251 206

*September 26 — October 20, 1899.*

*Railroads: Frightening horses at crossing: Contributory negligence of driver: Failure of flagman to give warning: Excessive speed: Proximate cause.*

1. In an action against a railway company for injuries received by being thrown from a wagon drawn by a runaway team alleged to have been frightened at a street crossing by reason of the negligence of defendant's flagman in failing to give warning of the approach of a train, it appeared conclusively that plaintiff failed to

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look in the direction whence the train was coming until after the horses became frightened, and that, had he looked, he could have seen down the track in that direction more than 170 feet. *Held*, that the plaintiff was guilty of contributory negligence precluding a recovery.

2. Failure of the flagman at a street crossing to give warning of the approach of a train which stopped before reaching the street would not render the company liable for injuries received by a traveler as the result of his team becoming frightened at the train.

3. The running of a train at an unlawful rate of speed is not the proximate cause of injuries received by a traveler by reason of his horses taking fright at its approach.

APPEAL from a judgment of the circuit court for *Dunn* county: E. W. HELMS, Circuit Judge. *Reversed.*

For the appellant there was a brief signed by *H. H. Field*, counsel, and oral argument by *Mr. Field.* They argued, among other things, that the flagman had no reason to apprehend that the horses would be frightened by the noise incident to a proper operation of the engine as it approached the crossing. There was no danger of a collision to be apprehended, and he was not bound to anticipate that the ordinary noises made by the engine while at a distance from the crossing would scare horses of ordinary gentleness. The testimony fails to show negligence on the part of the flagman. *Flaherty v. Harrison*, 98 Wis. 559, 563; *Eastwood v. La Crosse City R. Co.* 94 Wis. 163; *Simkin v. L. & N. W. R. Co.* 21 Q. B. Div. 453, 35 Am. & Eng. R. Cas. 487; *Mitchell v. Turner*, 149 N. Y. 39; *Favor v. B. & L. R. Corp.* 114 Mass. 350; *Henderson v. Greenfield & T. F. St. R. Co.* 172 Mass. 542; *Howard v. Union F. R. R.* 156 Mass. 159.

For the respondent there was a brief by *F. M. White* and *W. F. McNally*, and oral argument by *Mr. White.* To the point that the absence of the flagman was an invitation to cross and an assurance of safety, they cited *Glushing v. Sharp*, 96 N. Y. 676; *Palmer v. N. Y. C. & H. R. R. Co.* 112 N. Y. 234; *Evans v. L. S. & M. S. R. Co.* 88 Mich. 442;

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*Richmond v. C. & W. M. R. Co.* 87 Mich. 374; *Burns v. North Chicago R. M. Co.* 65 Wis. 312, 315; *White v. C. & N. W. R. Co.* 102 Wis. 489; *Rohde v. C. & N. W. R. Co.* 86 Wis. 309.

CASSODAY, C. J. This action was commenced March 28, 1898, to recover damages for personal injuries sustained by the plaintiff November 1, 1897, about 3 o'clock in the afternoon, by reason of his team becoming frightened and running away east on Second street in the city of Hastings, Minnesota, caused by the alleged negligence of the defendant in failing to give any notice or warning of the approach of the engine and cars, and in failing to have present at the time the customary flagman, and by running defendant's engine and cars faster than eight miles an hour, contrary to the ordinance of the city. Issue being joined and trial had, the jury returned a verdict in favor of the plaintiff, and assessed his damages at $5,000. From the judgment entered thereon for that amount of damages and costs the defendant brings this appeal.

It is undisputed that the Mississippi river, at Hastings, runs in an easterly direction along the north side of the city; that the defendant's main track runs north and south through the city on what was once Bailey street, but which has been vacated, and across the river; that Second street mentioned runs east and west across Bailey street, in which defendant's main track was so located; that Bailey street was ninety-nine feet wide; that the defendant's depot was on Bailey street, and extended a few feet east of the center of that street, and was on the west side of the defendant's main track, and about fifty feet south of the south line of Second street; that Second street was ninety-nine feet wide; that about 280 feet north of the north line of Second street was a switch from which started the track running southerly to Stillwater, and across Second street very nearly on

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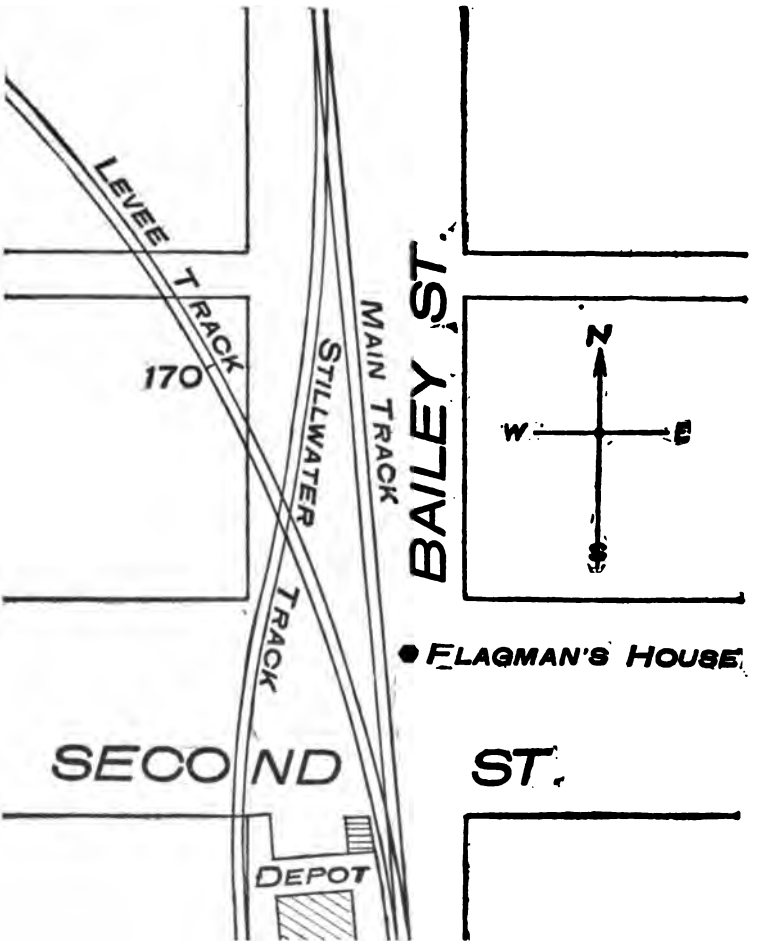
the west line of Bailey street, and passing south on the west side of the depot; that, starting at a point at or near the river, in the northwesterly part of the city, was a track known as the levee track, running easterly and southerly in




The above plat taken from the map referred to in the opinion shows the relative situation of the tracks at the crossing. The levee track is the one spoken of by the witnesses as the switch track.— REP.

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a curve, and reaching the main track a few feet north of the south line of Second street, and terminating with the main track in front of the depot; that the levee track crossed the Stillwater track about ninety-five feet from the center of Second street, measured by the line of the levee track.

The plaintiff's version of the accident is to the effect that about 3 o'clock in the morning of November 1, 1897, he and one Arnold, a teamster for Larson Bros., each started with a team and a load of lumber for that firm from Beldenville, Wisconsin, and to haul the same to Hastings; that they crossed the Mississippi, and drove west through Hastings along on Second street, and across the tracks in question, about 1 o'clock in the afternoon of that day, and saw the flagman at his shanty just east of the main track and a few feet south of the north line of Second street; that after unloading their lumber in the western part of the city, and feeding their teams, and getting their dinner, they started for home about 3 o'clock in the afternoon, traveling along east on Second street,—Arnold, with his team, being ahead; that, as they approached the railroad crossing, they saw wood and slabs piled six or eight feet high on the lot immediately north of Second street and west of the railroad tracks, and such piles terminated about fifteen feet west of the switch track; that the plaintiff had no box on his wagon and was sitting on the hind hounds of his wagon; that he held up his horses between a walk and a trot; that he looked ahead, to see if anything was in the way, and for the flagman, but saw nothing,—no flagman, no car, no engine; that after arriving at the crossing Arnold, who was about twenty feet ahead, motioned back for him to come on; that he was then on the Stillwater track, his horses being between that track and the switch track; that just then his horses saw the train, and started and jumped suddenly, and ran away; that he heard nothing until he looked around and saw the train coming down the levee track right at him, and then

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first heard the noise of the engine puffing off steam pretty fast; that he saw the engine first, and the car next,—only one car, a box car; that the engine was ahead; that he had no control of his team after Arnold so beckoned to him; that when he crossed the main track the train was within two rods of him, and that he did not see the train before he got onto the main track, because he did not look for it, as he was hanging on to his team; that as he was going east he did not, at any time, look to the north to see whether any train, or car, or engine was approaching, but looked straight ahead at his team and for a flagman; that he had no control of his team, and was in no shape to get control of anything, as he was jumped off the hounds of his wagon onto the reach, and it kept him busy to stay on the wagon; that his team passed on the north of Arnold's, and ran, and turned a sharp corner, and struck a rock a block east of the crossing, and injured him badly. Plaintiff was recalled the next day, and testified to the effect that when he crossed the levee track the train was ten or twelve feet from him; that at the time Arnold beckoned for him to come on he was between the Stillwater track and the levee track, and his horses then started to run, and then he heard the engine, but had not seen it before.

The plaintiff's witness Arnold, who was driving just ahead of him, testified to the effect that the piles of slabs mentioned were piled on the north side of Second street, and about one and one-half rods from the center of the traveled track, and reached to within twelve or fifteen feet of the Stillwater track, and were from six to eight feet high; that he saw the train coming up when he was on the main track; that the engine was blowing off steam; that at that time the engine was six or eight rods from the crossing; that he then beckoned to the plaintiff to come on, and that his team then started up quick; that he did not remember whether the car or the engine was ahead; that he saw the flagman come

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out of the shanty as he was crossing the main track; that he saw no occasion for the plaintiff's horses to run away, except that the train frightened them; that it was then six or eight rods away; that there was no trouble about seeing the engine and car; that there was no wind that day.

From the evidence on the part of the plaintiff thus summarized it conclusively appears that the plaintiff did not look north, nor in the direction of the coming car and engine, until his horses became frightened and were in the act of running away. True, in one part of his testimony he gives as a reason for not looking that the pile of slabs would have prevented him from seeing had he looked. But that could only be true before he had passed the east end of the slab pile. It is undisputed that the slab pile terminated fifteen feet west of the switch track, and was upon lower ground than the traveled portion of Second street. The map in evidence, made by the county surveyor of the county in which Hastings is situated, shows the streets and railway tracks in question, and was made upon a regular scale, and gives the distances. Its accuracy is conceded. From that map and the evidence in the record it conclusively appears that before the plaintiff reached the Stillwater track he could have seen down the levee track a distance of 170 feet from the center of Second street in that track; and that, as he moved east on that street, the distance he could see down that track gradually increased. By such failure to look the plaintiff was guilty of contributory negligence, and hence a verdict should have been directed in favor of the defendant. The reasons for such rule have been stated so frequently by this court as not to require repetition. *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 385, 386, and cases there cited; *Cawley v. La Crosse City R. Co.* 101 Wis. 145.

But there is a still more serious objection to allowing this verdict to stand. It is undisputed that the injury to the plaintiff was the result of his team becoming frightened and



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running away. The team took fright, apparently, by reason of the approaching car and engine. The engine was faced to the northwest, and was pushing a box car up the levee track towards the depot. There was only the one car and the engine. Just before or at the time the engine reached the junction of the levee track and the Stillwater track it stopped, as usual, in order that the switch connecting the levee track with the main track in front of the depot should be adjusted. From the place where the engine so stopped to the center of Second street on the levee track was ninety-five feet. In other words, the engine and box car stopped before the box car reached the north line of Second street. The only negligence of the defendant alleged or claimed was the failure of the flagman to give to the plaintiff timely notice and warning of the approach of the car and engine, and that the speed of the car and engine was greater than allowed by the city ordinance. True, as indicated, the plaintiff, after testifying that he did not see the train until he got onto the main track, and then it was two rods from him, was recalled the next day, and testified that when he crossed the levee track, which was a few feet west of the main track, the train was ten or twelve feet from him. From this it might be inferred that the engine and car actually crossed Second street at the time. But the most charitable view to be taken of his testimony is that suggested by reading it, and that is that he was so busy hanging on to his team, and keeping himself on the hounds and reach of his wagon, that ne gave little or no attention to the engine and car. The plaintiff's witness Arnold testified that when he was on the main track the car and engine were six or eight rods away, and that he heard it blowing off steam. Several witnesses, including the three trainmen, swore positively that the engine and car stopped before reaching the crossing; and the trainmen testify that when the teams were crossing over the railroad tracks the engine and car were

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near the stable designated on the map as 433 feet from the center of Second street, on the levee track. We think it is established by the undisputed evidence that the engine and car came to a dead stop, as usual, before reaching Second street. Certainly the evidence is insufficient to support a verdict that they did not stop. *Flaherty v. Harrison*, 98 Wis. 559.

These facts raise the question whether negligence of the defendant can be predicated on the failure of its flagman to stop the plaintiff and Arnold from crossing, or notify and warn them that a switch engine and car were coming on the levee track but were going to stop before crossing Second street. In other words, Is it incumbent upon railroads to notify travelers at street crossings whenever there is a switch engine operating in the vicinity? This court held ten years ago "that it was error to refuse to instruct the jury that there was no evidence of negligence in the operation of defendant's locomotive, which was engaged in switching cars near a street crossing, and that the same was not attended by unusual and unnecessary noises, when the plaintiff's team became frightened and ran away, causing the injuries complained of." *Abbot v. Kalbus*, 74 Wis. 504. As stated by Mr. Justice WINSLOW in a later case: "The right to operate a railroad includes the right to make the usual noises incident to the movement of its engines and trains, and it is matter of common knowledge that the exhausting of steam from the cylinder cocks is one of the noises very frequently accompanying the movement of engines." *Cahoon v. C. & N. W. R. Co.* 85 Wis. 572. Such rulings have been sanctioned in still later cases. *Bishop v. Belle City St. R. Co.* 92 Wis. 144, 145; *Flaherty v. Harrison*, 98 Wis. 559; *Dewey v. C., M. & St. P. R. Co.* 99 Wis. 457, 458. A prominent text writer states the rule thus: "A railroad company is not liable for injuries resulting from horses becoming frightened upon a highway at the mere

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sight of its trains or the noises necessarily incident to the running of trains and the operation of the road." 3 Elliott, R. R. § 1264, citing a large number of cases. What is said in *Ransom v. C., St. P., M. & O. R. Co.* 62 Wis. 178, inconsistent with the rules of law stated, must be regarded as overruled.

There is no reliable evidence that the engine was running faster than eight miles an hour; and, even if there had been, that was not the proximate cause of the injury. The proximate cause of the injury was, manifestly, the fright of the team. As a verdict should have been directed in favor of the defendant, it is unnecessary to determine whether it was error to refuse the instructions requested.

*By the Court.*—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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## KOEHLER, Respondent, vs. KOEHLER, Appellant.

*September 26 — October 20, 1899.*

*Evidence: Contracts: Foreign language.*

1. In an action upon an alleged agreement by a father to pay an adult daughter $1,000 if she would stay at home and work until her brother married, it was a material error to permit the plaintiff to testify to the effect that three years before the making of the contract sued on her father promised her $1,000 or men's wages if she would stay and work, and that she worked three years without pay on the strength of such promise.
2. In an action on an oral contract made in German, it was not error to refuse to permit a witness who had testified to the terms of the contract to state in German what the defendant said, where there was no claim that any German words of doubtful meaning or capable of two constructions were or might have been used, and it did not appear that any one was present at the trial capable of translating the German words to be elicited.

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Koehler vs. Koehler.

APPEAL from a judgment of the circuit court for St. Croix county: R. G. SIEBECKER, Judge. *Reversed.*

This is an action to recover for personal services rendered by the plaintiff to the defendant. It appeared from the evidence that the defendant was a man of seventy-five years of age at the time of the trial of the action, and had lived for many years on a farm in St. Croix county, Wisconsin, with his family, which consisted of his wife, one son, Charles, and two daughters, one of whom was the plaintiff. At the time of the trial the son was thirty-six years of age, and the plaintiff twenty-nine, and the other daughter twenty-seven years of age. In the fall of 1896 the defendant and his wife had troubles which resulted in the breaking up of the family and a divorce, and the mother and the two daughters went to Stillwater to reside, and have since resided there. The complaint alleges that on or about February 1, 1892, the plaintiff agreed with her father, the defendant, to work upon the farm for him until her brother, Charles, should marry, for the sum of $1,000; that Charles was married May 14, 1895, and that she worked for the defendant until such marriage; and that no part of the $1,000 has been paid. The answer was a general denial and an allegation of payment. There was evidence from the plaintiff and several witnesses tending to show that the contract was made as alleged by the plaintiff; and the defendant admitted that he agreed to pay the plaintiff $1,000 if she would stay at home and work upon the farm, but that the sum was not to be paid until after his death. The fact that the brother, Charles, was married in May, 1895, was not denied. A verdict for the plaintiff for the full amount of her claim was rendered, and from judgment thereon the defendant appeals.

For the appellant there was a brief by *W. F. McNally*, and oral argument by *F. M. White.*

For the respondent there was a brief by *John W. Bashford* and *A. J. Kinney*, and oral argument by *Mr. Kinney.*

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WINSLOW, J. The controlling issue in this case, as developed by the testimony, was whether the defendant, in February, 1892, agreed with the plaintiff that if she stayed at home and worked until Charles should marry he would pay her $1,000, or whether the agreement was simply that if she stayed at home and worked she should have $1,000 after her father's death. There was evidence tending to prove both of these claims. The plaintiff was allowed, however, to testify to a separate and distinct promise made by her father, as she claims, three years before the contract sued on, to the effect that if she stayed at home and worked he would pay her $1,000, or men's wages, and that she stayed and worked up to February, 1892, on the strength of this promise. This testimony was duly objected to as incompetent, irrelevant, and immaterial, and exception taken to its admission.

We do not see how the admission of this evidence can be justified. The evidence so admitted did not tend to show that the contract sued on was made at a different date from that alleged, but it tended to show another and different contract, made three years earlier, and carried out by the plaintiff, as substantive proof of the alleged later contract sued on. This was certainly erroneous, unless it can be said to be harmless. It seems very probable that the fact that the plaintiff had worked for three years without pay under a previous contract might appeal strongly to the feelings of a jury in determining the question whether the later contract was made in the form claimed by the plaintiff. At least, we cannot say that the jury would not be influenced by this improper testimony, and hence we cannot say that the error was harmless.

The talk between the parties at the time the alleged contract was made was conducted in the German language, and a witness who had testified to the terms of the contract was asked to state in German what the defendant said. An objection to this evidence was sustained, and this ruling is now

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alleged as error. We find no error. It was not claimed that any German words of doubtful meaning, or capable of two constructions, were or might have been used, nor did it appear that any person was present upon the trial capable of translating the German words which the witness might give in the answer to the question. Certainly, under these circumstances, there was no error.

Other rulings are complained of, but we have found none other which would necessitate reversal of the judgment, and it does not seem necessary to state them.

*By the Court.*— Judgment reversed, and action remanded for a new trial.

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BUNDY and another, Appellants, vs. MCLEAN, Respondent.

*September 26 — October 20, 1899.*

*Appeal: Findings: Partnership: Accounting.*

1. In an action between attorneys for an accounting and settlement of partnership transactions involving services rendered for a single client, a finding of the trial court that the partnership agreement was a conditional one and that the services in question were rendered by the defendant before conditions precedent to the completion of the partnership agreement had been performed, are *held* to be against the clear preponderance of the evidence.
2. Where the plaintiffs in such case were ready at all times to render legal services under the partnership agreement, the fact that little work was done by them gave the defendant no right to more than his agreed share of the earnings.
3. One of the plaintiffs and the defendant entered into a partnership agreement with the understanding that the other plaintiff should be a party thereto after a certain date. After the business of the partnership was fully consummated the defendant refused to account for money received in conducting it. *Held*, that an action for an accounting was the proper remedy by which to enforce plaintiffs' rights.

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Bundy and another vs. McLean.

APPEAL from a judgment of the circuit court for Dunn county: JAMES O'NEILL, Judge. *Reversed.*

Action for an accounting and settlement of partnership transactions. The complaint states that plaintiff *R. E. Bundy* and defendant formed a partnership to perform legal services for Mrs. B. Kimball in a pending divorce action and other business growing out of her controversies with her husband, the fees received for such services to be equally divided; that thereafter plaintiffs formed a partnership whereby *E. B. Bundy* acquired a one-half interest in *R. E. Bundy's* share of the profits of such business, with the consent of defendant; that thereafter plaintiffs fully performed the partnership agreement with defendant; that a considerable sum of money was earned in such business, one half of which, less the expenses, belongs to plaintiffs; that plaintiffs are unable to state the amount of such earnings, and that defendant has received the whole thereof and refused to account therefor or for any part of the same, or to pay any part thereof to plaintiffs. All of the material allegations of the complaint were put in issue by the answer.

The cause was tried by the court and resulted in findings of fact in substance as follows: In October, 1896, certain litigation was pending between Mrs. Kimball and her husband, in which Mr. J. F. Ellis was her attorney, with Mr. W. H. Frawley as counsel, the latter being assisted voluntarily by plaintiff *R. E. Bundy.* In that situation, about November 1, 1896, plaintiffs and defendant agreed to jointly serve Mrs. Kimball in the litigation mentioned, upon *R. E. Bundy* being substituted for Mr. Frawley and defendant being substituted for Mr. Ellis, and upon *E. B. Bundy's* retirement from the office of circuit judge, which was to take place on the first Monday of the succeeding January. Prior to the performance of either of the conditions precedent to the completion of the partnership agreement, Mr. W. P. Bartlett effected a settlement between the parties to the

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litigation, Mr. and Mrs. Kimball, independent of their attorneys in such litigation. In December, 1896, after such settlement, defendant, in a new action commenced by him, obtained a divorce for Mrs. Kimball, for which he received $100, and out of which he paid $16.20 for expenses. Defendant also received $135 for his services rendered to Mrs. Kimball before the conditional agreement between him and the plaintiffs. No partnership agreement was completed between plaintiffs and defendant, nor was any contemplated except upon condition of *E. B. Bundy's* retirement from office, and Mrs. Kimball's attorney, Ellis, and counsel, Frawley, being discharged, and the defendant and *R. E. Bundy* being substituted in their places.

On such findings judgment was rendered for the defendant for costs.

*J. R. Mathews*, for the appellants.

*Charles E. Freeman*, for the respondent.

MARSHALL, J. The main question is, Are the findings that no complete partnership agreement was made between plaintiffs or either of them and defendant, against the clear preponderance of the evidence? There is no controversy but that, before the date of the alleged partnership agreement, defendant had, for a period of about one year, advised Mrs. Kimball and assisted her professionally in various ways in her controversy with her husband, particularly in a divorce action in which J. F. Ellis was her attorney of record and W. H. Frawley her counsel, and that *R. E. Bundy* was a partner, in name, of Frawley and as such performed professional services in the action. That was the situation in the fall of 1896, when, all parties agree, there was talk between plaintiffs and defendant about uniting in serving Mrs. Kimball. Plaintiffs claim that a complete partnership agreement was made, and so testified, while defendant testified that there was only a conditional agreement. The trial court believed the defendant and found accordingly.

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The testimony upon which the findings on the subject rest is in substance as follows: *E. B. Bundy* testified that defendant proposed to him that he and his son *Robert* should join with the defendant in rendering professional services to Mrs. Kimball, taking for their services two thirds of the earnings; that he consented to enter into such an agreement after the first Monday of January, 1897, the earnings to be equally divided, *Robert*, in the meantime, to be employed; that defendant consented to that arrangement and asked him to report it to *Robert*, which was done; that the next time he heard of the matter was on the occasion of a visit by defendant to plaintiffs' office in January, 1897, at which time the defendant informed them that the divorce action had been settled, and suggested that they take $50 as their part of the fees; that Robert replied that if $50 was one half of the fees on an equal division of earnings, less expenses, according to the agreement, it was satisfactory, and that defendant did not reply; that the witness formed a partnership with his son *Robert* prior to such conversation, by the terms of which they became entitled, as partners, to whatever was due from defendant under the partnership agreement with him.

*Robert E. Bundy* testified that his father reported defendant's proposition as to their conducting Mrs. Kimball's legal business; that soon after that he conversed and agreed with defendant that they should act together in such business for an equal division of the earnings, if Mr. Frawley would consent and Mrs. Kimball would personally request him to serve as her attorney, at which time defendant agreed to induce Mrs. Kimball to make such request; that the witness thereafter obtained Mr. Frawley's consent and received from Mrs. Kimball a letter which reads as follows: "I heard that you are going away from Eau Claire to practice law with the judge, your father, and I want you to keep charge of my suit with Mr. Kimball and not Mr. Frawley, if you dissolve. . . . I will see you when I come to Menom-

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onie;" that subsequent to the reception of such letter he received another letter from Mrs. Kimball stating that on account of sickness she had delayed her trip to Menomonie, but would come the next Monday if able to travel; that subsequent to the writing of the last letter Mrs. Kimball visited Menomonie, called on the witness, and they together visited the defendant and talked over the pending case, at which time it was agreed that the witness should write to the judge who had the cause under advisement in regard to a legal question, urging the making of an early decision. The witness also corroborated his father as to the conversation with defendant after the settlement, and said that at a subsequent conversation the defendant refused to account to the plaintiffs for any part of what was received from Mrs. Kimball.

Mrs. Kimball testified that she wrote the first letter to *Mr. Bundy* at the defendant's request; that he furnished the draft for the letter, which she copied; that he requested her to return the draft; that she called on *Robert* in accordance with the suggestions in her letters, and that they together visited the defendant, where the two attorneys, she supposed, talked the case over some; that she supposed she retained *Mr. Bundy;* that she intrusted the matter of his employment to the defendant; that she made some agreement with *R. E. Bundy* outside of the letters, but not as to what he was to do or receive, that being left to the defendant; that defendant made some suggestion to her about the *Bundys* having $50; that she settled with the defendant for all the legal services rendered for her.

Mr. Ellis said that defendant suggested to him that *Mr. Bundy* would expect something. Frawley corroborated *Robert Bundy* as to consenting that the latter might take up the Kimball litigation, stating that he, Frawley, must have his fees for services rendered.

Defendant said that he had but one conversation with the

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*Bundys* in regard to their acting with him as Mrs. Kimball's attorneys; that such conversation was at his office in November, 1896, and resulted in an agreement that an arrangement should be made when the elder *Bundy* retired from office on the first Monday of the next January, and defendant should be substituted as attorney in place of Mr. Ellis and *Robert Bundy* in place of Mr. Frawley; that before the happening of such events the whole matter between Mrs. Kimball and her husband was settled up; that after such settlement he visited the *Bundys* at their office and informed them of it, and suggested that he would obtain $50 for *Robert* if he would induce Mr. Frawley to cut down his claim for attorney's fees; that *Robert* suggested that plaintiffs were entitled to one half of what had been earned by defendant in Mrs. Kimball's affairs, and that he replied thereto, "I do not see why;" that $135 was paid to defendant by Mrs. Kimball for services rendered before the conditional agreement, and $100, less $16.20 for expenses, earned in obtaining the divorce afterwards; that the new action was instituted pursuant to the agreement of settlement between the Kimballs; that the money was paid by Mr. Kimball; that defendant did not agree to induce Mrs. Kimball to request *Robert Bundy* to serve as her attorney, and did not have any talk with *Robert* about Mrs. Kimball's case; that *Robert* came to the office with Mrs. Kimball and immediately went away, nothing about the business being said.

Both of the *Bundys* denied being in defendant's office together, and *Robert* denied that defendant made any suggestion about obtaining $50 for him as consideration for inducing Mr. Frawley to cut down his bill.

The foregoing presents in brief all the material portions of the testimony and all that need be considered. It will be seen that defendant's testimony, upon which the court's findings are based, is not corroborated by any fact or circumstance, while it is contradicted by the testimony of both

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of the *Bundys*. *Robert Bundy* is corroborated by the following facts and circumstances: He obtained the consent of Mr. Frawley to take up the Kimball litigation; he was requested by Mrs. Kimball to act as her attorney; such request was made pursuant to a letter of instructions written by the defendant to Mrs. Kimball; Mrs. Kimball visited his office and they together called upon the defendant to consult about the divorce case; and after the settlement defendant, on several occasions, recognized that compensation from Mrs. Kimball was due to the *Bundys*, or one of them. The defendant testified that his suggestion to Mrs. Kimball by letter to write to *Robert Bundy* was made before the talk between him and the *Bundys*, but the probabilities all point the other way. It is not reasonable to suppose that defendant requested Mrs. Kimball to retain *Mr. Robert Bundy*, and talked with him and with his father about a community of interest in such services, after writing to Mrs. Kimball on the subject, without mentioning that fact. True, defendant explains the circumstance of the talk about $50 by saying that it was to be for services of *Robert* in obtaining a reduction of Mr. Frawley's bill, but the evidence of talk with Mr. Ellis and with Mrs. Kimball on the same subject corroborates plaintiffs' view and impairs the credit of the defendant. Nowhere does the defendant appear to be corroborated, but on the contrary he appears to be contradicted by all the evidence and the circumstances in the case, as before indicated. He denied that *Robert Bundy* talked with him about the case, but the fact that Mrs. Kimball visited *Robert Bundy's* office by appointment in relation to his acting as one of her attorneys, and that they together called upon the defendant, where, according to Mrs. Kimball's testimony, rightly understood, as well as *Robert Bundy's*, the pending case was the subject of conversation, strongly corroborates the latter. There was no reason for Mrs. Kimball's call upon *Robert Bundy*, in accordance with her written request

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for him to act as one of her attorneys, and the two visiting the defendant, unless the request was considered as accepted and the relation of attorney and client existed, and that *Mr. Bundy* and defendant were to act together. The only circumstance that could, in any view of the case, be taken as corroborating defendant's testimony, is the fact that, without substitution, defendant and plaintiffs could not control the pending litigation; but that is of little weight in view of the fact that defendant, though not in the case of record, had acted as Mrs. Kimball's adviser for a year, largely directed all operations, finally caused the litigation to be brought to a close independent of the attorneys of record, and obtained, as a part of the settlement, the sum of $100 to commence and prosecute to a conclusion a new suit for a divorce.

On the whole the evidence preponderates clearly against the findings of the trial court. So clearly, in fact, as to leave very little room for reasonable controversy as to where the truth lies. There seems to be no reason why the testimony of the defendant should be said to outweigh the mass of evidence, direct and circumstantial, against it. The fact that very little work was done by plaintiffs, or either of them, under the partnership agreement with defendant, is of little importance. The agreement having been made, so long as *Robert Bundy* was ready and willing to render legal services whenever called upon, the fact that defendant did substantially all the work gave him no claim to more than one half of the earnings, less the expenses. It is quite clear that defendant was anxious to secure the services and influence of plaintiffs, particularly of *Judge Bundy*, for his client and friend, Mrs. Kimball. His wishes in that regard were gratified, his client had the full benefit of that situation, probably, and it quite likely was a strong factor in bringing about the settlement. Further discussion is unnecessary. The great preponderance of the evidence is, clearly, that a

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partnership agreement was made, substantially as claimed by plaintiffs, and that they are entitled to one half of the net earnings in the business which the parties agreed to conduct.

Some question is raised as to the right of plaintiffs to maintain this action, but no difficulty in that direction is perceived. The partnership agreement between *R. E. Bundy* and defendant was entered into with the understanding that *E. B. Bundy*, after the first Monday in January, 1897, should be a party thereto. The business of the partnership was fully consummated before the action was commenced. Defendant refused to account for the money received in conducting the partnership business, so an equitable action for an accounting and settlement of the partnership affairs was the proper and only course for the plaintiffs to pursue. No question of law seems to be involved requiring consideration. The trial court found that $100 was earned and received by the defendant for services rendered after the talk with *Robert Bundy*, and that the rest of the payments to defendant were for services rendered by him before such talk. The $100, according to such findings, constitutes the partnership fund. That, less the expenses, leaves $83.80, $41.90 of which is the property of plaintiffs. The trial court should have found the existence of the partnership as claimed, and that the earnings consist of $100, and the net earnings $83.80; that all of such earnings were in possession of the defendant; and that he was liable to pay to the plaintiffs for their share thereof, $41.90.

*By the Court.*—The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment in favor of the plaintiffs in accordance with this opinion and for costs to be taxed.

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MAANUM, Appellant, vs. THE CITY OF MADISON, Respondent.

*September 27 — October 20, 1899.*

*Court and jury: Directing verdict: Municipal corporations: Steam roller in street: Frightening horses: Assumption of risk.*

1. When the facts proved, the probabilities, and all reasonable inferences are overwhelmingly against the plaintiff's case, the trial court should, on motion, direct a verdict for defendant.
2. In an action against a city for personal injuries occasioned by the horses behind which plaintiff was riding becoming frightened at a steam roller and running away, the evidence (stated in the opinion) is *held* to show, as matter of law, that plaintiff had repeated warnings of the presence of the roller and abundant opportunity to turn upon a side street, and that if she had looked she could have seen the roller down the road 700 feet away. She therefore assumed the risk of driving past it.
3. In such case, the claim that the roller was suddenly started as the team approached was not made in the original complaint, but appeared for the first time after plaintiff's examination as an adverse party, and was supported only by the inconclusive and contradictory testimony of plaintiff and her daughters, while it was negatived by every other witness and by every reasonable probability in the case. *Held*, that the court properly refused to submit the issue to the jury.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The plaintiff's cause of action may be briefly stated as follows: On October 14, 1895, plaintiff was riding along Monroe street, in the city of *Madison*, in a carriage. The horses became frightened at the city's steam roller, which was suddenly started without warning, and the plaintiff was thrown out of the carriage and injured. The complaint contains some allegations in regard to a "deep and dangerous ditch in the street," left without a railing or guard, and that the street was too narrow at this point for a team to be driven along safely; but this claim seems to have been abandoned on the trial, and the right to recover was apparently based

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upon the existence of the steam roller in the street, and its sudden starting without warning, occasioning fright to the team behind which she was riding. The answer admitted the presence of the steam roller in the street, denied the insufficiency of the street, and set up the defense of contributory negligence. At the close of the evidence the court directed a verdict for the defendant. The plaintiff brings the case here for review on appeal from the judgment.

For the appellant there were briefs by *Bushnell & Hall*, and oral argument by *A. R. Bushnell* and *F. W. Hall*.

*John A. Aylward*, city attorney, and *R. M. Bashford*, of counsel, for the respondent.

BARDEEN, J. The main question for our determination is whether, under all the evidence, the court ought to have submitted the case to the jury. When the defendant made the motion to direct a verdict the question presented to the trial court was one of mixed law and fact. It became his duty to weigh and consider the testimony in the case, and to apply to it those rules of law which are deemed controlling in cases of this kind. His duty was greater than in cases where a nonsuit is asked. Oftentimes in those cases the evidence will leave some of the controlling questions in doubt. There may be room, upon the facts, for different inferences or conclusions to be drawn. The court must always construe them in the light most favorable to the plaintiff. Giving them all the weight which the jury would be at liberty to find for them, the court must be able to say that there is no evidence to go to the jury, in order to justify a nonsuit. But in cases where a verdict is asked to be directed the situation is sometimes very different. It is then the duty of the court to pass upon *all* the testimony. The testimony of the defendant many times clears up the doubt, and makes it conclusive that only one possible inference can be drawn from the facts. Sometimes proof is offered by



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way of avoidance, entirely undisputed, which completely undermines the plaintiff's case. Again, the proof so offered may be so overwhelming one way that no reasonable inference can be drawn from it to support the plaintiff's case. In all such cases it is the duty of the court to grapple with the situation, and make such a disposition of the case as existing rules of practice and controlling principles of law demand. As said in *Finkelston v. C., M. & St. P. R. Co.* 94 Wis. 270, the court thereby discharges a judicial duty essential to the due administration of justice, and by no means trenches on the province of the jury. With all the helps the trial judge has at hand, his decision so made is entitled to weight, and in doubtful cases to controlling weight. *Powell v. Ashland I. & S. Co.* 98 Wis. 35. In view of the many decisions upon the question, it is hardly necessary to say that the courts of this state will not grant nonsuits or direct verdicts where there are facts proved from which, either directly or by reasonable inference, the jury may reach a different conclusion. It is equally true that when the facts, the probabilities, and all reasonable inferences are overwhelmingly against the plaintiff's case, the court will exercise its judicial functions and direct a verdict for defendant. In the light of these rules of law we will investigate the facts in this case.

The town of Madison was building a section of road near Wingra Park. The town had arranged with the authorities of the city of *Madison* for the use of its steam roller. The roller was being taken to its destination by the city employees. It arrived at a point on Monroe street about 150 feet east from the railroad crossing, pulled out to one side, and stopped. The plaintiff approached from the west, riding with her husband and two daughters. At a point in Wingra Park near Mr. Scott's store they were notified by the witness Bull that the roller was below, and to turn off on Grant street. A little further along, and about 550 feet

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west of the railroad crossing, they were met by the witness Herrick, who was the contractor building the road. He knew the roller was coming, and saw it while he was standing there. He told the plaintiff the roller was coming, and that they had better turn to the left, on a street a few rods west of the crossing. The plaintiff proceeded down the road, and at the intersection of the street last mentioned with the one upon which they were driving they were met by the witness Quinlan. He was a city employee, and had been sent ahead to warn travelers of the approach of the roller. He stood in the middle of the road, and motioned to them to turn on the side street, and told them that the roller was on the other side of the track. The driver whipped up his horses and drove on. Connors, the engineer of the roller, saw them coming, put up his hand, and told them to go the other way. He also saw the witnesses Herrick and Quinlan hail the team. The witness Berron was driving a sprinkling wagon, and had stopped in the street immediately in the rear of the roller. He saw both Herrick and Quinlan motion to the driver of the team, and heard Connors call to them. The team was driven along, and, as it approached the roller, shied to one side into a ditch, and the plaintiff was thrown out and injured. As to the warnings mentioned, the plaintiff's testimony is somewhat confused. The witnesses admit seeing the men who attempted to give the warnings, but claim they did not understand them. A view of the situation was taken by the court and jury, and certain profiles of the lay of the land were offered in evidence. The plaintiff and her witnesses claim that they did not see the roller until after they had crossed the railroad track. The proof is undisputed that it was in sight where the witness Herrick stood, over 700 feet from where it stopped; and, considering all the evidence, the conclusion is irresistible that they could have seen it if they had looked as they passed down the road. It was not

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unlawful to have the roller in the street. Having had repeated warnings of its presence, and abundant opportunity to have turned upon the side streets, they assumed the risk of driving past it.

But counsel for plaintiff are driven to adopt another theory. They claim the evidence shows that the roller was suddenly started as the team approached, which frightened the team and caused the accident. It is a little significant that this theory did not creep into the case until after the plaintiff had been examined as an adverse party. In her original complaint she made no claim of this kind. On her examination she testified she saw the roller move just as the horses got scared. On the trial she said she saw the roller just as she crossed the railroad track, and that when she first saw it it was moving slowly. The evidence of her daughter Julia is quite inconclusive. She says she saw the roller in the act of moving, or at least it was moving slowly. Another daughter says the roller was puffing when she first saw it. She said: "I heard the puffing, and seen the smoke. I think I saw the roller move." An inspection of her testimony leads to the conclusion that very little weight can be given thereto. She was evidently very simple-minded, and became involved in several contradictions. This testimony is contradicted by every other witness, and by every reasonable probability in the case. So cogent and potential are the facts, circumstances, surroundings, and reasonable probabilities, that we feel that the court committed no error in declining to submit the case to the jury. Cleared of the rubbish, and viewed in the light of the entire situation, we agree that the evidence falls far short of establishing any actionable liability on the part of the city. Such being our conclusion, it becomes unnecessary to discuss the rulings upon the admission of testimony. None of the rejected testimony had any tendency to relieve the case of the imperfections suggested.

*By the Court.*— The judgment of the circuit court is affirmed.

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WIDMAN, Plaintiff in error, vs. GAY, Defendant in error.

*September 27 — October 20, 1899.*

*Entire contract: Partial payment.*

A written contract by which plaintiff sold to defendant all the dirt on certain lots above a specified grade at six cents per cubic yard, and defendant agreed to remove it before a certain date, weather permitting, and to level up the lots and redistribute the black earth on the surface, is *held* to be an entire contract; and the making of a partial payment as the work progressed, which was not shown to have been at all proportional to the dirt removed or to have been intended otherwise than as an advance generally upon the gross sum ascertainable and payable only after full completion, does not indicate a contrary understanding by the parties.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

February 15, 1897, the parties entered into a written agreement by which the plaintiff agreed to sell to the defendant "all of the dirt on lots [described] above a certain grade, indicated by stakes on the corners of said lots, being 2,000 yards, more or less, at six cents per cubic yard. Party of the second part [defendant] agrees to remove said dirt from said lots by April 15th, weather permitting." Defendant also agreed to level up the lots and redistribute the black earth on the surface. Defendant proceeded to remove said earth, and continued, with more or less interruption, claimed by him to be due to the weather, until about April 27th, when, having removed about two thirds of the whole amount, the plaintiff forbade him further access to the lots, and sold the balance of the earth to some one else. Defendant had removed at that time somewhere from 1,200 to 1,700 cubic yards, varying according to witnesses' measurements, and had paid the plaintiff $70, whether in instalments or at what time does not appear. Plaintiff brought suit to recover: first, the balance of the contract price of the earth actually

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taken by defendant; second, the expense of leveling up the lots and black dirt; and, thirdly, damages resulting from inability to erect and use a greenhouse on the premises as early as if the earth had been removed by April 15th.

The court submitted to the jury substantially the following questions of fact: First, whether the defendant had breached his agreement by failing, without excuse from weather, to remove the earth within the time specified, so as to justify a termination of the agreement by the plaintiff; secondly, if not so in breach, was he prevented from fully completing his contract, and from obtaining all of the earth agreed to be sold him, by the acts of the plaintiff? The jury were instructed substantially that unless the defendant had so broken his agreement the plaintiff was not entitled to recover anything, either for earth taken by the defendant in excess of the $70 paid, or for either of the other elements of damage, and that, if defendant had broken his agreement, plaintiff would be entitled to recover the two elements of damage, namely, the price of the earth not paid for, and the cost of leveling the lot. The jury rendered a verdict for the defendant, on which judgment for costs against the plaintiff was entered, to review which plaintiff sues out writ of error.

For the plaintiff in error there was a brief by *Bird, Rogers & Bird*, and oral argument by *E. Ray Stevens.*

*Frank M. Wootton*, for the defendant in error.

Dodge, J. The principal error assigned consists in the fact that the circuit court construed the contract as entire, and denied recovery for the earth actually taken in case the jury found that plaintiff prevented removal of the whole without breach on defendant's part. An entire contract is one where, in the intention of the parties, full and complete performance on the one side constitutes the consideration for performance on the other. It is not necessary that the price named shall be a lump sum. It may be measured

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by quantity or by units. *Boutin v. Lindsley*, 84 Wis. 644; *Warehouse & Builders S. Co. v. Galvin*, 96 Wis. 523. Nor is it essential that, by the terms of the contract, actual payment is to be postponed until after full completion, if earlier payments are merely advancements upon the whole price, and not ratable payments for performance of several and distinct parts, as in *Goodwin v. Merrill*, 13 Wis. 658. It suffices that full performance is the consideration of the price to be paid, and earlier actual payments on account of the full price are not necessarily inconsistent with entirety. *Cohn v. Plumer*, 88 Wis. 622; *Green v. Hanson*, 89 Wis. 597; *Mount v. Lyon*, 49 N. Y. 552. We are constrained to the conclusion that this contract was entire. In terms, it relates to *all* the earth above a specified level. The amount was not great, and ascertainment of amount taken at various intervals would have been inconvenient and burdensome. There is no intimation in the contract that any part or share was to be paid for before the whole had been taken, and part of the price, viz. the leveling up of the lot and distribution of black earth over the surface, was incapable of performance until after complete delivery. All these things indicate the intention and understanding of the parties to contract for a single and completed piece of work. The payment of $70, much urged by plaintiff in error, is in no wise inconsistent with such understanding. It is not shown to have been at all apportioned to the earth removed from time to time, or to have been intended otherwise than as an advance generally upon the gross sum ascertainable and payable only after full completion.

The other errors assigned relate wholly to the other elements of damage to which plaintiff might be entitled upon defendant's breach of the contract. Any such breach having been negatived by the verdict, and no such damages, therefore, being recoverable, any errors with reference thereto are immaterial.

*By the Court.*— Judgment affirmed.

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O'MALLEY, Respondent, vs. FRICKE and another, Appellants.

*September 27 — October 20, 1899.*

*Service of summons: Order for publication: Jurisdiction: Collateral attack.*

1. Under sec. 2640, R. S. 1878 (providing that the order directing publication of a summons shall also contain a direction that a copy be deposited in the postoffice addressed to the defendant, or a direction that such deposit may be omitted because the defendant's postoffice address cannot be ascertained), an order for publication containing neither a direction for mailing nor a direction that the mailing may be omitted is fatally defective, and no jurisdiction of the person sought to be served is acquired by the publication.
2. A lack of jurisdiction affirmatively appearing from the record may be taken advantage of upon collateral attack upon a judgment.

APPEAL from a judgment of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

This is an action of ejectment for a farm of 122 acres. Both parties claim title under Thomas O'Malley, the plaintiff founding her title upon a decree of divorce between herself and Thomas O'Malley rendered by the circuit court for Sauk county September 14, 1897, and the defendant *Bridget Fricke* founding her title upon a warranty deed executed by Thomas O'Malley to herself December 18, 1897. The principal and controlling question upon the trial was whether the decree in the divorce action was a valid decree and constituted an effective transfer of the title of the land in question to the plaintiff. The court held the decree valid, and from a verdict in favor of the plaintiff the defendants appeal.

*G. Stevens*, for the appellants.

For the respondent the cause was submitted on the brief of *Herman Grotophorst.*

WINSLOW, J. Two contentions are made by the appellants: first, that the order of publication in the divorce action was

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void, and hence that no jurisdiction was obtained by the court in that action; and, second, that, even if jurisdiction to render judgment for divorce was obtained, still the court could not transfer the title to real estate when the only service upon the defendant was substituted service.

It seems entirely plain that, following the decision of this court in *Beaupre v. Brigham*, 79 Wis. 436, the order of publication in this case was fatally defective, and hence that no jurisdiction was obtained by the publication of the summons. The statute governing service by publication (sec. 2640, R. S. 1878) provides that the order shall direct the publication of the summons and also contain a direction that a copy of the summons and complaint be deposited in the postoffice, addressed to the defendant, "*or a direction* that such deposit may be omitted because the defendant's postoffice address cannot be ascertained." The order in the present case contained neither a direction for mailing, nor a direction that mailing might be omitted. It avails not to say that it was shown by the affidavit for publication that the defendant's postoffice address could not be ascertained. This is insufficient. There must also be a judicial finding of that fact contained in the order. As this requirement is jurisdictional, the result follows that no jurisdiction was obtained of the defendant by the publication of the summons. The lack of jurisdiction affirmatively appearing from the record, it may be taken advantage of upon collateral attack. *Cody v. Cody*, 98 Wis. 445. This ruling is decisive of the case, and renders unnecessary the consideration of the second question raised by the appellant. A verdict for the defendants should have been directed.

*By the Court.*— Judgment reversed, and action remanded for a new trial.

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BERGER, Respondent, vs. BERGER and others, Appellants.

*September 27 — October 20, 1899.*

*Vendor's lien on land: Abrogation by statute: Death of vendee: Homestead.*

1. The general rule is that a vendor of real estate has an equitable right to a lien thereon to secure unpaid purchase money, though such right is not an interest in the land, but the mere capacity to acquire an interest through the interposition of a court of equity.
2. The right to a vendor's lien for unpaid purchase money may be abrogated by statute, but in the absence of such a statute it is not lost by the death of the vendee.
3. Sec. 2271, Stats. 1898, providing that a homestead, in case of the death of its owner without having lawfully devised the same, shall descend to his heirs free of all claims or liens, with certain exceptions not including liens for unpaid purchase money, abrogates, as to such property, the common-law right to acquire a vendor's lien thereon.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

Action to have unpaid purchase money of lands adjudged to be an equitable lien thereon. The complaint states that plaintiff, being the owner of an undivided interest in land described, sold such interest to Leo Berger for $400, payable April 12, 1894, with interest thereon at the rate of six per cent. per annum; that subsequently Berger died, leaving a widow and children, the defendants in this action; that the property has not been paid for; that Leo Berger, from the time he purchased the property till his death, occupied it as his homestead, and that he left no other property out of which plaintiff can recover her claim; that such claim has been duly allowed by the county court. The defendants demurred to the complaint for want of facts sufficient to constitute a cause of action. The demurrer was overruled and defendants appealed.

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*W. S. Stroud*, for the appellants.

For the respondent the cause was submitted on the brief of *J. H. Rogers*.

MARSHALL, J. It is conceded that, ordinarily, a vendor of real estate has an equitable right to a lien upon the subject of the sale for unpaid purchase money. *Tobey v. McAllister*, 9 Wis. 463; *Wickman v. Robinson*, 14 Wis. 493. Also that the death of the grantee does not extinguish the right of lien; that notwithstanding such circumstance, such right may be enforced against the widow and heirs at law of the deceased vendee. *Crowe v. Colbeth*, 63 Wis. 643. It is contended by the appellants, however, that such rule does not apply to a homestead, because as to such property the common-law rule has, by implication, been abolished by statute.

It is an old and well-established principle of equity that a vendee of land cannot in good conscience retain it and not pay therefor in full, and that a court of equity will recognize and enforce the vendor's equitable rights. That right, however, is not a lien in the strict sense of the term, though it is commonly spoken of as such. It is not an interest in the land reserved by the vendor, but is a mere equitable right to a lien. Till the right is judicially fixed upon the land, the vendor is possessed of but the capacity to acquire a lien, which he may lose in various ways. Being but a mere creature of the unwritten law, it may be changed or abolished entirely by statute if thought best in the wisdom of the legislature. The right to a vendor's lien has been abolished by legislative enactments in many of the states, and in others, because of the policy of the recording acts, it has been treated as nothing but a mere floating equity prior to the commencement of judicial proceedings to acquire a specific lien upon the land. *Jones v. Ragland*, 72 Tenn. 539. A purchaser without notice of the equity of a vendor is entirely unaffected by it. The conveyance of land by deed

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passes the entire title, legal and equitable, to the vendee, subject to the vendor's equitable right to resort to it to collect unpaid purchase money, saving, however, the rights of innocent third persons. Except as otherwise provided by statute, and saving the rights of innocent interveners for value, the vendor may demand the exercise of the power of a court of equity to lay hold of the property and subject it to the payment of the purchase-money claim.

Now our statute (sec. 2271, Stats. 1898) provides that "When the owner of any homestead shall die, not having lawfully devised the same, such homestead shall descend, *free of all judgments and claims against such deceased owner or his estate except mortgages lawfully executed thereon and laborers' and mechanics' liens.*" Looking at that language alone, there is no room for any other conclusion than that the right to a vendor's lien is thereby abolished in case the property is a homestead. But it is said that, in *Carey v. Boyle*, 53 Wis. 574, this court passed upon the question here involved, by sustaining the right of lien. An examination of that case, however, as suggested by appellants' attorney, reveals the fact that the attorneys for both sides of that controversy conceded the right of lien in favor of a vendor, notwithstanding the death of the vendee. Such right was not questioned, presented, considered, or discussed. The controversy was as to whether a person who furnishes the vendee the money with which to make his purchase is entitled to the benefit of the equitable rule for the protection of vendors. The effect of the statute as to freeing a homestead from the equitable right to a lien for unpaid purchase money upon the death of the vendee, did not occur to the counsel who presented the case, or to this court. That is quite evident.

It is further suggested that this court has held that the homestead right cannot extinguish an existing lien of a judgment, and from that it is argued that a purchase-money

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lien, so called, cannot be displaced by the death of the debtor, and that the statute (sec. 2271, Stats. 1898) was not intended to have that effect. The difficulty with that is twofold. First, as we have shown, the purchase-money lien, so called, is not an interest in the land reserved in the vendor; it is not a lien at all in the sense of being a vested interest in the property, as is the lien of a judgment. Second, it by no means follows that, because a judgment lien upon land cannot be extinguished by its subsequent occupancy as a homestead, it will not be extinguished, if a homestead, by the death of the owner. This court has made no decision that way, and it will be noted that the statute expressly provides that the homestead shall descend free of *all judgments against the owner*. We are referred on this subject to *Upman v. Second Ward Bank*, 15 Wis. 449, and *Bridge v. Ward*, 35 Wis. 687, but they have little or no bearing on the question under consideration. In the first case the point decided was that if a judgment once becomes a lien on real estate, the subsequent occupancy thereof as a homestead will not extinguish such lien,—quite a different question than whether a judgment lien on the homestead of the judgment debtor will be extinguished by his death by force of the statute governing the descent of homesteads. In the other case the point decided was that a judgment against a devisee of lands, existing at the time the devise takes effect by the death of the testator, will immediately attach to the land devised and cannot thereafter be extinguished by the mere subsequent occupancy of the land by the debtor and devisee as a homestead. The case goes no further than *Upman v. Second Ward Bank*.

Again, it is suggested that to give the statute the literal meaning contended for by the appellants, would cut off tax liens. That is suggested as conclusively demonstrating the proposition that there is room, at least, for judicial construction of the section under consideration; that, as it cannot

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be claimed that the lien of a tax will be affected by the death of the owner of a homestead, the lien for purchase money must be governed by the same rule. But, as we have heretofore indicated, there is a wide difference between the mere capacity to acquire a lien,— a mere floating equity, as stated,— and an actual incumbrance upon the title. Again, it may well be said that the term "claims against the deceased or his estate" refers to claims founded on contract of some kind, and not to impositions laid on property under the taxing power of the state. Further, it is by no means beyond legislative power to free a homestead, by the circumstance of the death of the owner, from even tax liens levied subsequent to a legislative enactment in that regard.

The language of the statute seems plain and unmistakable. "*Such homestead shall descend, free of all judgments and claims against such deceased owner or his estate except mortgages lawfully executed thereon and laborers' and mechanics' liens.*" The mere right to acquire a lien cannot be called a mortgage. That term applies only to conveyances in writing of equitable interests in land as security. To give any other meaning to it, or to make any exception when the statute plainly says there shall be none, would violate the plainest principles of statutory construction.

It is often said that in the construction of statutes courts should look to the effects and consequences, but that applies only where there is room for construction,— where there is ambiguity of expression or where to follow the literal sense would lead to some absurd result. Here there is no ambiguity. The language is plain. To follow its literal sense will strictly conform to the policy of the law to protect homestead rights. Moreover, there is no hardship whatever in requiring the owner of an equitable right against a homestead to enforce it in the lifetime of the debtor or suffer its loss. On the contrary it is a very wise provision of law. Laws for the protection of homestead rights are among the

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most beneficent of legislative enactments, and for that reason they are uniformly liberally construed and rigorously enforced.

We must hold to the plain letter of the statute, deciding that the right to enforce a vendor's lien upon a homestead is lost by the death of the owner of such homestead.

*By the Court.*— The order appealed from is reversed, and the cause remanded for further proceedings according to law.

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SHENNERS, Appellant, vs. PRITCHARD and another, Respondents.

*September 27 — October 20, 1899.*

*Land contracts: Forfeiture: Void or voidable? Election: Recovery of purchase price: Limitations: Covenants: Conditions precedent: Tender of deed.*

1. By a land contract the purchasers bound themselves to pay the purchase price in instalments at specified times, and the vendor agreed that if the purchase price and interest should be fully paid he would execute and deliver a warranty deed of the premises within a reasonable time after demand. The contract also provided that if the purchaser failed to make any of the payments as specified the agreement should thenceforth be "utterly void and of no effect and all payments thereon forfeited, subject to be revived and renewed" by the vendor or the mutual agreement of both parties. *Held*, that failure to make payments as specified did not render the agreement absolutely void so that no action at law could be maintained on it by the vendor, but gave the vendor an election to declare the contract void or to continue it in force and sue for the purchase price or for specific performance.
2. The action of the vendor in such case in deeding the land to a third person and assigning the contract to him, and the bringing of a suit by the assignee for the unpaid purchase money, are *held* to be an election to declare the contract still in force.
3. The vendor and his assigns, not being bound by the contract to make their election within any given time, may exercise it at any time

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before they are cut off by the statute of limitations, where it does not appear that the vendees have suffered any injury or loss for which they might obtain relief in equity.

4. The fact that the deed from the vendor in such case antedates the assignment of the contract is of no significance, unless it was shown that the conveyance by deed was an independent transaction and intended to cut off the vendees' rights.

5. A clause in said contract imposing upon the vendor the duty of grading streets, etc., is *held* to be an independent covenant and not a condition precedent to a recovery of the purchase price.

6. The covenant as to the giving of the deed being that the vendor will, after full payment and within a reasonable time after demand, execute and deliver the deed, tender of a deed before commencing action to recover the purchase price is unnecessary.

APPEAL from a judgment of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

On June 25, 1893, the defendants purchased of the C. Obrecht Land Company two lots, under a land contract, for which they agreed to pay $425,—$100 cash, and the balance in three equal annual payments, with six per cent. interest, payable semi-annually on the 15th days of January and July of each year. The contract was in the usual form of land contracts, and contained the following clauses deemed material to this litigation: "The party of the first part agrees to grade streets and lay sidewalks free of expense to party of the second part." "Second. The said party of the first part hereby covenants and agrees that, if the aforesaid purchase price and interest shall be fully paid at the times and in the manner above specified, it will, within a reasonable time after demand, execute and deliver to the said parties of the second part, their heirs, executors, administrators, or assigns, a good and sufficient warranty deed in fee simple of the premises above described, free and clear of all legal liens and incumbrances, except the taxes herein agreed to be paid by the said parties of the second part." "Third. And it is further distinctly agreed and understood by and between the parties hereto that, if the said parties of

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the second part shall fail to make any of the payments of purchase money above specified at the time and in the manner above specified, in such case this agreement shall henceforth be utterly void, and all payments thereon forfeited, subject to be revived and renewed by the act of the party of the first part or the mutual agreement of both parties."

The defendants made the cash payment and paid interest to January 25, 1895, and no more, and neglected to pay the taxes for the year 1897. On May 5, 1898, the land company conveyed the premises described in the contract to plaintiff, by warranty deed, not mentioning the contract. June 10, 1898, the land company duly assigned the land contract to plaintiff, who brings this action thereon, at law, to recover the balance due from defendants. The answer admitted the making of the contract and failure to pay, and sets up fraud and misrepresentation on the part of the land company, and certain other matters not material at this time. On the trial the plaintiff offered in evidence the land contract mentioned, a warranty deed from the land company to him, an assignment to him of the land contract, and a tax receipt for the taxes of 1897, and rested. Thereupon the defendants moved the court to direct a verdict for defendants. This motion was granted on the ground that the provision in the contract as to a forfeiture rendered the contract a nullity, and that no action at law could be maintained thereon. From the judgment entered upon the verdict the plaintiff brings this appeal.

For the appellant there was a brief by *Fowler & McNamara*, and oral argument by *C. A. Fowler*.

For the respondents there was a brief by *Lamoreux, Davison & Davison*, and oral orgument by *S. W. Lamoreux*.

BARDEEN, J. According to the court's ruling, the provision in the land contract to the effect that, if the purchasers failed to make payments as specified, the "agree-



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ment shall henceforth be utterly void," rendered it absolutely void for all purposes, and no action at law could be maintained thereon. Thus it would be left at the option of the vendee in the contract to terminate it any time he saw fit, by simply failing or refusing to pay any further instalments due thereon. This contention cannot be sustained unless it can be said that the clause mentioned contains mutual covenants designed to neutralize and render ineffective the prior covenants in the contract. In the opening clauses of this contract the defendants bound themselves, by direct covenants, to pay the purchase price of the land at certain specified times. Now they say that, because the contract says that if they fail to pay in the manner specified the contract shall be void, they may elect to so consider it, and the prior covenants to pay became nugatory. This construction eliminates therefrom another clause in the contract, which says that the forfeiture shall be "subject to be revived and renewed by the act of the party of the first part," the vendor. No case can be found in this state which will sustain the construction of the trial court. The only case cited by defendants' counsel to sustain his contention is a *per curiam* decision from Pennsylvania (*Neill v. Peale*), found in 4 Atl. Rep. 830, and not considered of sufficient importance to have been included in the official reports. This decision is opposed to the great weight of authority, as we shall see, and has no support in reason or justice.

Suppose, after the contract had been executed, the defendants became dissatisfied with their bargain, and they had refused to make the first payment; could it be claimed that they could *then* forfeit the contract? The forfeiture clause is that, if they fail to make the payments at the times and in the manner specified, it shall be void. They agreed to pay a cash payment of $100. This is certainly one of the payments specified. Under the court's construction they might, notwithstanding they had executed and delivered the con-

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tract, then and there end its existence by a refusal to pay. Whether this would be so or not depends upon the intention of the parties, which is to be gathered from the whole contract, every part of it to have meaning and effect if possible. An extract from the opinion of SAVAGE, C. J., in *Mancius v. Sergeant*, 5 Cow. 271, seems to cover the case. The learned judge says: "What, then, was the meaning of the parties when they entered into this contract? Did they intend it should be a *felo de se*, or that the defendant below might make it so, or valid and operative, at his election? What inducement could the plaintiff below have had for making such a contract? The covenants of the defendant below were absolute, and on his performance the plaintiff below would have been bound; but the clause providing for a forfeiture of previous payments was totally inoperative until at least one payment made. The whole clause providing for the vendor's discharge from his covenants and the forfeiture of the vendee's payments is clearly a condition in favor of the former, not the latter. The vendee was bound to pay at all events. If he had failed, even after having made payments, the vendor might consider the contract at an end, and sell the land to another. If, however, he chooses not to do so, but holds the vendee to the contract, he has an undoubted right to enforce it by compelling payment. A contrary doctrine would be allowing the vendee to take advantage of his own negligence, without any advantage to the vendor, but rather an injury, as he is in the meantime prohibited from selling the land to any other purchaser." To the same effect are the following cases: *Mason v. Caldwell*, 10 Ill. 196; *Wilcoxson v. Stitt*, 65 Cal. 596; *Chambers v. Anderson*, 51 Kan. 385–394; *Cartwright v. Gardner*, 5 Cush. 273; *Smith v. Mohn*, 87 Cal. 489; *Newton v. Hull*, 90 Cal. 487. And see *Phillips v. Carver*, 99 Wis. 561, and *Banbury v. Arnold*, 91 Cal. 606.

A review of this case leads to the conclusion that this clause in the contract leaves it for the vendor to say whether

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he will declare the contract void or not, and that he may elect to sue for the unpaid purchase money or for a specific performance of the contract, or to declare the contract at an end. The vendor having deeded the land to plaintiff and assigned the contract, the bringing of a suit for the unpaid purchase money is deemed a sufficient election to declare the contract still in force. The fact that the vendor or his assigns has made no election until suit brought cannot change the situation. They were not bound by the contract to make such election within any given time, and where it does not appear that the vendees have suffered some injury or loss, for which they may obtain relief in equity, the former may bring their action any time before they are cut off by the statute of limitation. The fact that the deed antedates the assignment of the contract is of no significance, unless it is shown that the conveyance by deed was an independent transaction and intended to cut off the defendants' rights under the contract.

The clause in the contract that "the party of the first part agrees to grade streets and lay sidewalks free of expense to party of the second part" is so very vague and uncertain in its terms that it may be doubtful if any damage could be claimed for a breach of it. Without determining that question, we are of the opinion that it is an independent covenant, and not a condition precedent to plaintiff's recovery. See *Farmers' L. & T. Co. v. Hunt*, 16 Barb. 514.

The claim that a deed must be tendered before action brought has no foundation to stand upon. The covenant as to the giving of a deed expressly states that the vendor will, after full payment and within a reasonable time after demand, execute and deliver the deed. This question seems to have been met and covered by the case of *Gale v. Best*, 20 Wis. 44, which is deemed decisive against the defendants' contention.

*By the Court.*— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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SCHLUCKEBIER and others, Appellants, vs. BABCOCK and others, Respondents.

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*September 27 — October 20, 1899.*

***Bill of exceptions: Extension of time for settling: Discretion.***

Refusal to permit an unsuccessful party to file exceptions to the findings, and to extend the time within which to settle a bill of exceptions, after the time therefor had expired, is *held* not to have been an abuse of discretion, where the record failed to disclose any adequate excuse for the delay of over six months after the entry of judgment, or to show that a bill of exceptions would be of any advantage if settled.

APPEAL from an order of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

An issue, on appeal from county court by the present respondents, was tried in the circuit court for Columbia county on the 18th day of May, 1898. Findings were made and filed, and judgment entered, on June 6th, and notice of entry of judgment was duly served on the attorneys for these appellants on the 26th day of July. An extension of time to settle the bill of exceptions was granted to some time in December. No exceptions to the findings were filed. On February 1, 1899, appellants served notice of a motion for an order permitting them to file exceptions to the findings, returnable February 14th, and renewing and extending the time in which they might serve and settle the bill of exceptions, which was accompanied by a proposed bill of exceptions. The order being denied, an appeal was taken therefrom. The affidavits, proposed bill of exceptions, and order are included in the record, but not the pleadings, findings, or judgment. From the bill of exceptions it appears that the appellants did not offer any evidence upon the trial.

For the appellants there was a brief by *Malone & Miller*, and oral argument by *J. E. Malone.*

For the respondents there was a brief by *Sawyer & Sawyer*, and oral argument by *H. W. Sawyer.*

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DODGE, J. The record not only fails to show any adequate excuse for the delay for more than six months from the entry of the judgment, but it also fails wholly to show that a bill of exceptions could be of any advantage to the appellants if settled. Upon no subject is the discretion of the trial court broader than upon applications by parties in default for favors and extensions of time in matters of mere procedure, such as this. We discover no abuse of such discretion here.

*By the Court.*— Order appealed from affirmed.

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HILL, Respondent, vs. TRUE, Executor, and others, Appellants.

*September 27 — October 20, 1899.*

*Trusts and trustees: Following trust fund: Guardians: Estates of decedents: Jurisdiction of circuit court: Parties: Limitation of actions.*

1. Where the interest of minors in lands which had been devised to them subject to a life estate in the testator's widow was sold by their guardians and the proceeds invested in other lands, title to which was taken in the name of the widow, who was one of the guardians, the last-mentioned lands became impressed with a trust in favor of the wards.
2. Upon the settlement of the testator's estate in such case personal property remained, title to which passed to said wards under a residuary clause in the will. Such property was also sold by the guardians, the proceeds invested in lands, and the title taken in the name of the widow. *Held*, that such lands also became impressed with a trust in favor of the wards, and that upon a sale thereof other lands purchased in the widow's name with the proceeds became impressed with the trust.
3. The widow having subsequently transferred the trust property or its proceeds to one of the wards who, though she had knowledge of the rights of the other ward, her brother, nevertheless attempted to dispose of the same by her will to the exclusion of the brother, the latter may maintain an equitable action, against the executor

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of his sister's will and the legatees, to determine his rights in the property.

4. The circuit court may properly take jurisdiction in such a case, since the controversy relates to real estate or its proceeds, and plaintiff seeks to have the same charged with a trust in his favor, and to have the title adjudged to be vested in him, which could not be done in the county court.

5. Allegations in the complaint in such a case that the transactions by reason of which the trust in plaintiff's favor arose took place in 1865 and the years following, while he was a minor, but that he had no knowledge of the terms of his father's will under which he claimed until after the death of his sister in 1897, shortly after which this action was commenced, do not show that his right of action was barred under the statute of limitations.

APPEAL from an order of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

For the appellant *True* there was a brief by *Herman Grotophorst;* for the other appellants there was a brief by *Bentley & Bentley;* and the cause was argued orally by *F. R. Bentley.*

Counsel for the appellant *True* contended, *inter alia*, that respondent was seventeen years old when the transactions took place, and must have known whether his father died testate or intestate. He neglected to investigate and ascertain his rights in his father's property for twenty-seven years. He was therefore guilty of the grossest kind of laches. *Rogers v. Van Nortwick*, 87 Wis. 414; *Thomas v. Thomas*, 88 Wis. 88; *Melms v. Pabst B. Co.* 93 Wis. 153; *Penn M. L. Ins. Co. v. Austin*, 168 U. S. 685; *Higgins v. Crouse*, 147 N. Y. 411; Angell, Limitations, § 187; *Farnham v. Brooks*, 9 Pick. 212; *Preston v. Horwitz*, 85 Md. 164; Perry, Trusts, § 864.

*R. D. Evans*, for the respondent.

CASSODAY, C. J. This is an appeal from an order overruling a demurrer to the complaint in an action to determine the rights of the plaintiff in the property described, and alleging, in effect, the following facts:

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On June 27, 1865, one Amos E. Hill, father of the plaintiff and the defendant *True's* testatrix, executed his will at his residence in New Hampshire, wherein, after the payment of his debts and funeral expenses, he gave and bequeathed to his wife, Nancy S. Hill, all of his household furniture, all the provisions he might have on hand at the time of his decease, and one good cow and one farrow cow. He also gave and devised to his wife, for and during the term of her natural life, or while she remained his widow, the homestead farm upon which he lived in Sandwich, New Hampshire, containing about sixty acres of land, to have and to hold the same, to her and her assigns, with all the appurtenances thereto belonging, for and during such term, the farm to be occupied by her or her assigns without impeachment of waste. Such bequest and devise to his wife was intended to be instead of her dower and distributive share in his whole estate. He also gave and devised to his daughter, Sarah E., one undivided fourth part of the homestead farm mentioned, subject to the above legacy to his wife, also his yearling heifer and one sheep. He also gave and devised to his son, *George M. Hill*, the plaintiff herein, his heirs and assigns, forever, all the rest, residue, and remainder of his estate, real, personal, and mixed, wherever found and however situated; and he thereby appointed John C. Haines sole executor of his said will, and thereby revoked all former wills by him made.

Soon after making such will, Amos E. Hill died at his residence in New Hampshire, leaving $1,500 in value of personal property and $700 in value of real estate, and also leaving him surviving his widow, Nancy S., his son, *George M.*, the plaintiff herein, and his daughter, Sarah E., the defendant *True's* testatrix, as his sole heirs at law. Such will was duly admitted to probate in the county court of Carroll county, New Hampshire, July 4, 1865, and thereupon administration thereof was duly committed unto the executor so named therein. Upon the settlement of the

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estate of Amos E. Hill there remained $1,000 of such personal estate, which, by the terms of the will, passed to and became vested in the plaintiff. The undivided three-fourths of such real estate passed to and became vested in the plaintiff, and the undivided one-fourth thereof passed to and became vested in Sarah E., subject, however, to the life estate of Nancy S.

On February 6, 1866, the plaintiff and Sarah E. both being infants, Nancy S. and John C. Haines were duly appointed their general guardians, and as such, and on April 3, 1866, obtained a license to sell such real estate. On August 20, 1866, Nancy S. and John C. Haines, as such guardians, sold and conveyed all the right, title, and interest of the plaintiff and Sarah E. in and to such real estate to one Sinclair for $255.50, and also sold all the residue of such personal estate, subject to the use of Nancy S., but no inventory nor account thereof was by them filed, and no settlement of such guardians' account was at any time had with the plaintiff after he became of age. In 1866 said guardians left New Hampshire, and came to Sauk county, Wisconsin, to reside, when the plaintiff was sixteen years of age. Such guardians brought with them to Sauk county the moneys arising from the sale of such real and personal property, and on July 27, 1866, Nancy S. purchased certain of the real estate described in the complaint, and took the title in her own name. At that time Nancy S. had no separate estate of any kind, except such as arose from the sale of the residue of Amos E. Hill's estate, in which she had such life estate. Thereafter Nancy S. invested the remainder of such estate in various securities in her own name, and thereafter received the income thereof for and during the remainder of her natural life. Nancy S. had no gainful occupation, and did not increase the amount of such property. A few days before her death Nancy S. delivered to Sarah E. Hill all such personal property, moneys, and effects, to the amount of about $400.

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On August 21, 1885, Nancy S. sold and conveyed to the plaintiff the lot therein described in consideration of $200. On January 30, 1889, Nancy S. conveyed to the Methodist Episcopal Church the lands described in consideration of $400. The moneys arising from such sales Nancy S. invested in her own name, and, after using the income thereof, and just before her death, she delivered the same to Sarah E., she then having knowledge of the plaintiff's rights therein. On January 31, 1890, Nancy S. conveyed the lands described to Sarah E., she then having knowledge of the plaintiff's rights therein. A few days afterwards Nancy S. died. Nothing is alleged as to the settlement of her estate.

On October 30, 1897, Sarah E. executed her last will and testament. On November 5, 1897, she died at her home in Baraboo. Thereupon, and before the commencement of this action, such will was filed and admitted to probate, and the defendant *True* was appointed executor thereof, and he thereupon gave the requisite bond, and qualified, and entered upon the duties of such trust, and June 20, 1898, made and filed an inventory of the lands and property owned or held in the possession and name of Sarah E. Hill at the time of her death. The will so left by her is to the effect that she thereby gave and bequeathed to the plaintiff $300, also two chairs, two rugs, and one picture of herself and the plaintiff; that she gave and bequeathed to her executor in trust $50 for the use of her niece Laura; that she gave and bequeathed to the Baraboo Cemetery Association $50, to be used in the care of her mother's grave; that she gave and bequeathed all her books and album to Mary Blatchley; that she gave and bequeathed two bedroom carpets and kitchen carpet and all wearing apparel to Tina Farnsworth; that she gave and bequeathed and devised to her executor all the real estate she might die seised of, in trust, however, for the following uses and purposes,— that is to say: Her executor should sell her real estate, and reduce the same

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to money, as soon as practicable, and out of the proceeds thereof she thereby directed such executor to pay all her just debts, including the funeral expenses, and the balance of such moneys she thereby gave and bequeathed to the *First Presbyterian Church of Baraboo.* She thereby gave and bequeathed all the rest of her furniture, bedding, carpets, pictures, fruit dishes, stoves, and whatever other house furniture there might be to her aunt, Sarah Moulton. All the rest, residue, and remainder of her property she thereby gave and bequeathed to the *Railway Young Men's Christian Association of Baraboo.*

The complaint also alleges that at the time Sarah E. Hill made her will the entire property mentioned and described in the inventory so filed by the defendant *True* belonged to the plaintiff, except $175 and the household furniture, wearing apparel, carpets, books, pictures, and chairs, and that he had no knowledge nor information as to the terms of his father's will, nor as to his interest in his father's estate, until after the death of his sister; and that prior to that time he supposed his mother was the sole owner thereof.

The executor, *True*, the *First Presbyterian Church and Society of Baraboo*, and the *Railway Young Men's Christian Association of Baraboo* are all made defendants. The theory of this action is that the plaintiff is the real and equitable owner of the property hereby sought to be obtained, and that his mother or sister, or both, purchased the same with money which, in law and in equity, belonged, or largely belonged, to him.

It is contended that the plaintiff has no legal capacity to maintain this action; this is on the theory that, with certain exceptions unnecessary here to mention, personal property is never inherited, but upon the death of the owner passes to the executor or administrator, and from the executor or administrator to the legatee or distributee; that the title of the executor or administrator intervenes between the tes-

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tator and the legatee and between the ancestor and the next of kin. *Kirkendall's Estate*, 43 Wis. 167–179; *Murphy v. Hanrahan*, 50 Wis. 490; *Hall v. Hall*, 98 Wis. 199, and cases there cited. With real estate, however, the rule is different, and upon the death of the owner the title passes directly to the devisee or to the heir at law. *In re Estate of Pierce*, 56 Wis. 560; *Newman v. Waterman*, 63 Wis. 616, 617; *Prickett v. Muck*, 74 Wis. 205; *Hiles v. Atlee*, 90 Wis. 78; *Hall v. Hall*, 98 Wis. 201. Under the allegations of the complaint, and from these authorities, it follows that upon the death of Amos E. Hill the title to his real estate passed by devise to his children, subject to his widow's life estate. Moreover, the title and interest of such children in such real estate were sold by their guardians, and the proceeds thereof invested in real estate in Sauk county, the title to which was taken in the name of the widow; and, of course, such real estate thereby became impressed with a trust in favor of such children, respectively. *Gunn v. Blair*, 9 Wis. 352. Besides, the complaint alleges that Amos E. Hill left personal property of the value of $1,500; that upon the settlement of that estate there *remained* of such personal estate property worth and of the value of about $1,000, the title to which passed to and became vested in the plaintiff under the residuary clause of the will; and that such $1,000, or a large portion thereof, was used by such guardians in purchasing land in Sauk county, the title to which was taken in the name of the widow. If such allegations are true, then it necessarily follows that the lands so purchased with such remainder of the personal estate became impressed with a trust in favor of the plaintiff; and so, if such lands were sold and with the proceeds thereof other lands were purchased and the title to the same taken in the name of the widow, such other lands became impressed with the same trust. We must hold that under the allegations of the complaint the plaintiff has such an interest in the property mentioned in the inventory

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so filed by *Mr. True* as such executor, or some part thereof, as is sufficient to maintain an action to determine his rights in such property. If such property is so impressed with such trust, then the defendants the *Presbyterian Church* and the *Young Men's Christian Association* would necessarily take under the will of Sarah E., subject to such trust; and, since this is an equitable action, the church and the association are proper parties defendant.

It is contended that the plaintiff's remedy, if any, must be obtained in the county court, and hence that the circuit court had no jurisdiction. But the case is peculiar, and after careful consideration we are constrained to hold that the circuit court properly took jurisdiction. The controversy relates to real estate or the proceeds of the sale of real estate. The plaintiff seeks to have such real estate charged with a trust in his favor, and to have the title to the same adjudged to be vested in him. This could not be done in the county court, and hence the plaintiff had no complete remedy in that court. This court has repeatedly and recently held that in such a case the circuit court may properly take jurisdiction. *Hawley v. Tesch*, 72 Wis. 299; *S. C.* 88 Wis. 213; *Lamberton v. Pereles*, 87 Wis. 456; *Meyer v. Garthwaite*, 92 Wis. 571; *In re Klein*, 95 Wis. 246; *Burnham v. Norton*, 100 Wis. 8. It is unnecessary to renew the discussion of the questions determined by these cases.

Under the allegations of the complaint we cannot hold that the plaintiff's right of action is barred by the statutes of limitation. The case should be tried upon the merits.

*By the Court.*— The order of the circuit court is affirmed.

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## DANE COUNTY, Appellant, vs. REINDAHL and others, Respondents.

*September 29 — October 20, 1899.*

*Statutes: Repeal by implication: Register of deeds: Salary.*

Prior to 1895 every register of deeds received fees as his sole compensation except where such fees amounted to less than $300. Ch. 169, Laws of 1895, made the office a salaried one in counties having a population of 150,000; and ch. 165, Laws of 1897, authorized the county board of any county not containing a city having more than 20,000 inhabitants to make the office a salaried one. The revision of 1898 provides (sec. 764) that "*every* register of deeds" shall receive certain fees, etc., except (sec. 764*a*) that in counties having a population of 150,000 he shall receive a salary in lieu of fees — these provisions being substantially the same as those in force prior to the enactment of ch. 165, Laws of 1897. No other provisions in respect to the register's compensation are contained in the revision of 1898. The act of 1897 is not included therein, nor is it among the laws specifically repealed (sec. 4978), although the act of 1895 is among the latter. Sec. 4978 repeals, however, in addition to the acts enumerated therein, "all other acts and parts of acts, the subjects whereof are revised and re-enacted in these statutes, or which are repugnant to the provisions herein contained." It appears from the legislative journals that the joint committee on revision recommended that ch. 165 be omitted on the ground that it was unconstitutional. *Held*, that the whole subject of the compensation of registers of deeds was revised and covered by the revision of 1898, and that ch. 165, Laws of 1897, was repealed thereby.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This is an action upon the official bond of the defendant *Reindahl*, as register of deeds of Dane county. The complaint charges that *Reindahl* was elected register of deeds of the said county, November 8, 1898; that on November 18, 1897, the county board of supervisors of Dane county, in pursuance of ch. 165, Laws of 1897, duly adopted a resolution making the office of register of deeds of Dane county

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a salaried office, and prescribing the salary thereof; that on December 17, 1898, the defendant *Reindahl* as principal, and the other defendants as sureties, executed and delivered to the plaintiff their bond in the sum of $5,000, conditioned for the faithful performance of the duties of register of deeds, and, further, that the register "should faithfully and regularly collect all fees, as provided by the laws of the state of Wisconsin, and pay over to the said county of *Dane* all such sums of money collected as fees, as required by chapter 165 of the laws of 1897." The complaint further alleges the approval of said bond, and that between January 2 and March 31, 1899, *Reindahl*, as register, received, as fees from said office, $966.85, which he refused to account for or pay over to the county, and judgment is demanded against him and his sureties for said sum with interest and costs. A general demurrer to said complaint was sustained, and judgment entered dismissing the complaint, and from such judgment the plaintiff appeals.

For the appellant there was a brief by *M. S. Dudgeon*, attorney, and *Olin & Butler*, of counsel, and oral argument by *H. L. Butler*. To the point that where a statute, even though it be a revision of former acts, contains a clause repealing certain acts, the presumption is conclusive that it was the legislative intention to keep all other acts in life, they cited *Lewis v. Stout*, 22 Wis. 234; *Simmons v. Bradley*, 27 Wis. 689; *Smith v. Eau Claire*, 78 Wis. 457; *Bentley v. Adams*, 92 Wis. 386; *Bird v. Sellers*, 122 Mo. 23; *Carpenter v. Jones*, 121 Cal. 362; *Ruge v. Gallagher*, 22 Misc. (N. Y.), 572; *Gaston v. Merriam*, 33 Minn. 271; *State v. Young*, 30 S. C. 399; *State v. Pollard*, 6 R. I. 290.

For the respondents there was a brief by *Erdall & Swansen*, and oral argument by *J. L. Erdall*. They argued, among other things, that in 1898 a complete revision was made of the laws in force in this state pertaining to the compensation of register of deeds, etc., and the fees collected by them,

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and consequently the prior laws relating to the same subject were repealed. *State v. Campbell*, 44 Wis. 529; *Burlander v. M. & St. P. R. Co.* 26 Wis. 76; *Moore v. S. & St. C. R. Co.* 34 Wis. 173; *Oleson v. G. B. & L. P. R. Co.* 36 Wis. 383; *Curry v. C. & N. W. R. Co.* 43 Wis. 665; *Schneider v. Staples*, 66 Wis. 167; *State ex rel. Ennis v. Janesville*, 90 Wis. 157.

WINSLOW, J. The argument in support of the demurrer is based upon two grounds, namely: first, that ch. 165, Laws of 1897, was repealed by the Statutes of 1898; and, second, that, if not repealed, said chapter is unconstitutional, because it violates sec. 23 of art. IV of the constitution, providing for uniformity of town and county government.

1. Prior to 1895, every register of deeds received fees as his sole compensation, except that where such fees amounted to less than $300 per annum the county board might pay a salary not exceeding $200. S. & B. Ann. Stats. sec. 764. By ch. 169, Laws of 1895, it was provided that in all counties containing a population of 150,000 people the register of deeds should receive a specified salary, and pay all fees into the county treasury, and give a bond in the sum of $25,000 to secure such payment, in addition to the usual register's bond. By ch. 165, Laws of 1897, the county board of any county not containing a city having a population of more than 20,000 people was authorized to make the office a salaried office, and in such case all fees were required to be paid into the county treasury, and the register was required to give such additional bonds as the county board should determine.

This was the situation of the laws on the subject, September 1, 1898, when the revision of 1898 went into effect. Stats. 1898, sec. 4978.

By sec. 764 of this revision it is provided that "*every* register of deeds" shall receive certain fees therein fixed, with the additional provision that when all fees of any register

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amount to less than $300 per annum the county board may pay a salary not exceeding $200 a year. Sec. 764*a* provides that sec. 764 shall not apply to counties shown by the last census to have a population of 150,000 or more, but that in such counties the register shall receive a specified salary in lieu of fees, and shall quarterly pay over all fees received to the county treasurer. Sec. 755 provides for the giving of a bond by every register in the sum of $3,000 for the faithful performance of the duties of his office, and also provides that in counties with a population of 150,000 or more an additional bond in the sum of $25,000 shall be given, conditioned for the faithful paying over to the county treasurer of all fees received. There are no other provisions bearing on the subject of the compensation of registers of deeds contained in the revision of 1898, nor is ch. 165, Laws of 1897, named in sec. 4978 in the table of laws expressly repealed by the revision, although ch. 169, Laws of 1895, is named in that section as expressly repealed.

Ch. 165 not being expressly repealed by the revision of 1898, the question is whether it is impliedly repealed. This is a question of intention of the legislature, to be gathered from the laws passed. A repeal by implication is not favored, and, when two acts on the same subject may well subsist together, the prior law will be upheld. On the other hand, the rule is well settled that a statute which revises the whole subject matter of a former statute works a repeal of such former statute, without express words to that effect. *State v. Campbell*, 44 Wis. 529.

Starting with the fact that the Statutes of 1898 were intended to be a revision of the entire body of general laws of the state, we cannot escape the conclusion that the legislature intended to repeal ch. 165, Laws of 1897. The presumption is certainly strong that, while endeavoring to formulate a code covering the duties and compensation of all registers of deeds, they did not intend to leave a part



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of the subject to be governed by an obscure session law. And this presumption is much strengthened by the fact that elaborate provision was made for the exception contained in ch. 169, Laws of 1895. If this exception, applying only to one county, seemed necessary to be incorporated in the law, why should not the exception contained in ch. 165, Laws of 1897, be also incorporated, if it was intended to be preserved?

Furthermore, it appears from the legislative journals that the joint committee on revision of the statutes, when they reported the revision bill, recommended that ch. 165, Laws of 1897, be omitted because it was in their judgment unconstitutional. This court may take notice of the journals of the legislature. *McDonald v. State*, 80 Wis. 407.

We see no reason to doubt that the whole subject of the compensation of registers of deeds was revised and covered by the revision of 1898. Just why ch. 165 was not included in the list of laws expressly repealed is not clear,— probably it was accidental. But sec. 4978, Stats. 1898, further provides that, in addition to the acts enumerated, "all other acts and parts of acts, the subjects whereof are revised and re-enacted in these statutes, or which are repugnant to the provisions herein contained," are also repealed. Ch. 165 is included in both of these classes. Its subject was not only revised and re-enacted in the sections before named, but its provisions are repugnant to those sections, because those sections, in terms, cover "every" register of deeds in the state, and fix his compensation.

This view renders it unnecessary, and even improper, to consider the question of the constitutionality of the law.

*By the Court.*— Judgment affirmed.

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Baxter vs. Chicago & Northwestern R. Co.

# BAXTER, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

*September 28 — October 20, 1899.*

(1–6) *Special verdict: Questions to be submitted: Discretion: Instructions to jury.* (5–13) *Negligence: Personal injury: Proximate cause: Explosion of locomotive boiler: Defects: Evidence: Expert testimony: Photographs.* (6, 7, 9, 11) *Appeal: Immaterial errors.* (14, 15) *Excessive damages: Remission: New trial.*

1. The object of a special verdict is to obtain a decision of issues of fact raised by the pleadings, not to decide disputes between witnesses or controversies over evidentiary facts.
2. The right to a special verdict is satisfied by a submission to the jury of a sufficient number of questions to cover, singly, every material fact in issue under the pleadings which is in dispute on the evidence.
3. In preparing a special verdict, every material fact in issue by the pleadings, controverted on the evidence, affecting the rights of the parties in respect to the final result, should be covered by a question, and those facts from which any such issuable fact may be taken as inferable may properly be omitted, though questions covering such evidentiary facts may be added in the discretion of the court.
4. Where a cause is submitted for a special verdict, such instructions should be given respecting each question as to enable the jury to answer it intelligently, and a refusal to do so, by the rejection of specific requests to that end, is error, if the subject matter of such requests be not otherwise covered by proper instructions; but instructions regarding the effect of an answer, or the answers as a whole, should not be given.
5. A question as to whether defects, found by the jury to have existed under such circumstances that the defendant knew or ought to have known of them, were the proximate cause of the injury, was a sufficient submission of the question of whether defendant was guilty of negligence which was the proximate cause of such injury, in connection with instructions given to the jury, that in order for them to find that such defects were such proximate cause they were required to find from the evidence that the defendant ought reasonably to have apprehended that such defects might probably cause an injury to some person.

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108 545
108 619

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109 43
109 552

104 307
110 [3]120
110 [13]346
53 LRA 659

104 307
112 [13] 48
112 [1] 55
112 [6] 59
112 [4]228
47 LRA 693

104 307
e118 [14]140

104 307
114 [1]82
d114 [13]295
d114 [13]296
114 [3]480

104 307
116 [16]641

6. An instruction that the proximate cause, in the law of negligence, is the direct and natural cause, is not proper. It is the natural and probable cause, and from which, in the light of attending circumstances, a personal injury might reasonably have been expected by a person of reasonable intelligence and prudence. Such an instruction, however, is not prejudicial in connection with an instruction limiting what is direct and natural to such things as the person responsible ought in the exercise of ordinary care to have apprehended.

7. The test of whether defendant was guilty of a want of ordinary care in caring for its locomotive boilers, was whether its conduct came up to the customary care exercised by corporations generally in the same line of business, and evidence of an expert as to what care should be exercised to discover defects in such boilers, independent of such general custom, was not relevant except in regard to whether such custom was obviously insufficient; but such evidence was not prejudicial since it accorded with the customary way of inspecting boilers as shown by the evidence.

8. Practical experience of a person, sufficient to fairly show that he is possessed of more than ordinary knowledge in regard to a proper subject of opinion evidence, sufficiently shows competency of such person to give such evidence.

9. The opinion of a witness in regard to the limits of safe boiler pressure, based on a hypothetical question assuming the existence of a material defect not testified to, is error, but not prejudicial where the subject of inquiry is the cause of the explosion of a boiler causing a personal injury, except as bearing on the measure of damages, where the cause of such explosion conclusively appears by other evidence.

10. The claim being that a boiler which exploded and caused the injuries complained of, including the flues thereof, was in a generally worn-out condition, and that because of such condition as to the shell the explosion took place, evidence of the condition of the flues, as well as other parts of the inside structure of the boiler, was proper on the question of knowledge or reasonable means of knowledge on the part of the defendant of the existence of defects in the shell.

11. A plaintiff being in court and no reason appearing why the jury cannot have a view of his injured leg, which is a subject of inquiry, the exhibition of a photographic representation of it and permission to the jury to take such photograph to their room is not prejudicial error if the witnesses on both sides describe the condition of the leg substantially as shown by the photograph, and no request is made that they be allowed to see the original.

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12. Photographic representations are not proper where the original can be readily exhibited to the jury, unless used to aid in identifying some writing or detecting a forgery.
13. Opinion evidence is the most unsatisfactory kind of evidence that can be produced, and falls to the ground as worthless and insufficient to support a verdict when inconsistent with undisputed facts or reason and common sense applied to other credible evidence.
14. Where a judgment in favor of a plaintiff in a personal injury action is right as regards the legal liability of the defendant, but reversible because of the reception of irrelevant evidence tending to prejudice the jury and increase the amount of their verdict, and because compensation was allowed for a disability which does not in fact exist, the court may properly permit the plaintiff, at his election, to avoid a new trial by taking judgment for such sum as will, in the judgment of the court, do justice to the defendant.
15. In naming a sum for which plaintiff may take judgment in the circumstances above indicated, the right of the defendant to a jury trial is not invaded if the amount be placed as low as in all reasonable probability the jury found by their verdict, independent of the prejudicial elements. That is, the court in such a case should not undertake to say what sum of money will measure the plaintiff's loss, but what sum the jury said, by their verdict, stripped of its prejudicial elements and giving defendant the benefit of reasonable probabilities in respect to the amount of the recovery, will measure such loss.

BARDEEN and DODGE, JJ., dissent.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

Action by an employee of defendant to recover compensation for personal injuries received by him by the explosion of a locomotive engine, claimed to have been caused by defendant's keeping it in use with knowledge, or reasonable means of knowledge, that it was defective to a degree which rendered such an accident among the natural and reasonable probabilities, and one which, in the exercise of ordinary care, it should have apprehended.

On January 24, 1898, plaintiff was in the employ of defendant as a fireman on its locomotive engine No. 249, then

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located at its roundhouse at Madison, Wisconsin. He had no knowledge but that the engine was safe, or of any of the defects which resulted in its destruction and in his injuries. While he was in his proper place in the cab of the engine the engine boiler exploded, casting upon him steam, hot water, and portions of the machinery and material of the engine, whereby he was scalded, one of his legs was broken in several places and crushed, he was badly bruised in and about his face and other portions of his body, and he received other injuries of a serious character. Such facts were all set forth in detail in the complaint, and it was alleged that defects in the boiler, which reasonable and proper inspection would have brought to defendant's knowledge, caused the explosion. The defects mainly pointed out in the complaint were, partial destruction of the boiler plates along the seams by the corrosive action of water, called "grooving," thin places in the boiler plates caused by long use, and worn-out flues. Damages were claimed to the extent of $30,000. The answer put in issue all the allegations charging the defendant with actionable negligence.

On the trial the evidence of defects was confined to grooving, to thin places in the boiler plates caused by the action of the water, called "pitting," some slight evidence of lamination, being places in the plates where the primary plates were not perfectly welded together into a single plate, crystallization of the iron, and weak flues. The principal controversy as to the extent of the injuries plaintiff received was in respect to whether his spine and spinal cord were permanently injured.

There was a special verdict, finding as facts that the locomotive boiler was defective from grooving and pitting, and not from lamination, and that such facts were discoverable before the accident by reasonable and proper tests which should have been applied by the defendant; that such defects caused the explosion of the boiler and were the proxi-

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mate cause of plaintiff's injuries; that plaintiff's right leg and spinal cord were permanently injured, and his damages were $11,500. There was the usual motion to set aside the verdict and grant a new trial. Judgment was rendered for plaintiff for the damages assessed by the jury and for costs.

For the appellant there was a brief by *Fish, Cary, Upham & Black*, attorneys, and *Edward M. Hyzer*, of counsel, and oral argument by *Mr. Hyzer*.

For the respondent there was a brief by *R. M. LaFollette, A. R. Bushnell*, and *G. E. Roe*, and oral argument by *Mr. LaFollette* and *Mr. Roe*.

MARSHALL, J. The chief controversy on the trial was as to whether the defective condition of the boiler, which caused the explosion, ought to have been discovered by the defendant before that event, and guarded against. To cover that field by the special verdict, defendant's attorneys requested the court to submit for answers these four questions: "Could the defects have been discovered without removing the flues from such boiler?" "Was it the ordinary custom and practice among persons generally, using locomotive boilers of a like kind, under similar circumstances, to remove the flues for the purpose, only, of inspecting the shell of such boiler?" "Was the boiler of engine No. 249, up to the time it exploded, used, operated, treated, and inspected by the defendant in the manner usually and ordinarily followed by persons generally, who use, operate, treat, and inspect locomotive engine boilers of a like kind under similar circumstances?" "If you answer 'Yes' to question No. 10, did such use, operation, treatment, and inspection cause or reveal any defects which caused the injury to plaintiff?" Such questions were rejected and in lieu thereof, following the question of whether the boiler was defective in fact and the nature of the defects, this question was submitted: "If you find in answer to question No. 5 that the boiler was defective at the time of said

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explosion, then could the defendant company through its agents and servants, by reasonable and proper care, tests, or inspection, have discovered such defects before the explosion?" In connection with such question the jury were instructed as follows: "Reasonable care as used in this question means such care as ordinarily careful persons exercise under like circumstancess, and reasonable tests and inspections mean such tests and inspections as are made and employed by ordinarily prudent persons engaged in the same business and under like circumstances." That ruling is assigned as error and it appears to be one of the chief grounds of complaint. Appellant's counsel do not contend but that the real fact in issue was, by the court's question as explained, placed before the jury for determination, but they contend that the right of defendant to a special finding as to every material fact in issue, stripped of all conclusions of law, was violated because the question required the application of legal definitions and explanations in order to enable the jury to properly answer it, the result being that the final conclusion embodied in the answer was rather a conclusion of law than one of fact; and in support of that a lengthy argument upon the character of a special verdict under the statute was presented.

It seems hardly necessary at this day to discuss questions so elementary as what constitutes a special verdict. It is a finding upon all the material issues of fact raised by the pleadings. A failure to distinguish between such facts and the numerous evidentiary circumstances which may be the subjects of controversy on the evidence and are relied upon to establish the ultimate facts upon which the case turns, often leads to unjust criticism of a special verdict. A conclusion is not one of law because it is reached by a process of reasoning from many primary circumstances. While such circumstances may be in dispute, the real question is, Do they lead with reasonable certainty to, and establish,

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the fact alleged by the pleading upon the one side and denied by the pleading upon the other? If the subject of the allegation in the complaint be one of law, or of mere evidence, it has no proper place in the pleading, and hence no necessary place in the special verdict. By the complaint, certain facts are alleged to exist constituting the plaintiff's cause of action and warranting the remedy sought. Those facts, if put in issue by the answer, and controverted on the evidence, in case of a special verdict, must appear to exist thereby, or the conclusion of law must be against the plaintiff. The object of a special verdict is solely to obtain a decision of issues of fact raised by the pleadings, not to decide disputes between witnesses as to minor facts, even if such minor facts are essential to and establish, by inference or otherwise, the main fact. *Goesel v. Davis*, 100 Wis. 678; *Eberhardt v. Sanger*, 51 Wis. 72; *Jewell v. C., St. P. & M. R. Co.* 54 Wis. 610; *Klochinski v. Shores L. Co.* 93 Wis. 417; *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215. A strict compliance with this rule requires that the verdict be made up of sufficient questions to at least cover, singly, every fact in issue under the pleadings. If that could always be kept in view, the legitimate purpose of such a verdict in promoting the administration of justice would be uniformly accomplished, and the opinion entertained by some that its use is harmful would cease to exist.

Testing the ruling of the trial court by what has been said, it is free from any reasonable criticism. Neither of the questions which were refused called for a response to any issue raised by the pleadings. Each called for a finding as to some essential as a matter of law to, or bearing on the existence of, the main fact, each being, however, of a strictly evidentiary character. The real fact in issue was as to whether the condition of the boiler which caused the explosion ought to have been known to the defendant. The question submitted plainly covered that subject. The degree

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of care with which defendant was chargeable was strictly a legal question. Whether that degree of care was exercised in the instance under consideration was strictly a question of fact. The instruction properly laid down the law for the guidance of the jury, and the question called for an answer as to whether the defendant came up to the legal standard in the particular instance. The jury were thus called upon to find the fact, not the evidence of the fact, leaving it to the court to apply thereto the proper legal principles. No doubt the finding of evidentiary facts is sometimes helpful in tying the jury down to the precise question in controversy, by keeping before them the barriers they must overcome in order to reach the conclusion contended for by plaintiff; but so long as the ultimate question is properly one of fact, or of mixed law and fact properly pleadable as matter of fact, and essential to the cause of action upon which a recovery is sought, it is strictly the proper subject of a question, and those facts from which it is or may be inferable may properly be omitted.

The idea advanced by counsel for the defendant that the statutory right to a special verdict is only satisfied by questions that do not need to be considered in the light of legal principles given to the jury by the court, is contrary to the universal practice and the settled law upon the subject. Often, whether certain conduct complained of is negligence, where the evidentiary facts are all established, is a question of fact, in respect to which different minds may reasonably come to different conclusions. In that situation it is necessary to carefully instruct the jury regarding the standard of care necessary to the performance of the duty alleged to have been violated, leaving it to them to determine whether the alleged wrongdoer came up to the legal standard in the particular instance complained of. The question of contributory negligence, of proximate cause, and what is reasonable, are only, ordinarily, determinable by viewing evi-

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dentiary facts in the light of legal principles. The ultimate fact being only properly determinable by viewing evidentiary facts in the light of legal standards, instructions by the court in regard to such standards are necessary. When such ultimate facts are established, the legal liability follows as a conclusion of law. At that point the jury should not be instructed. They are to find the facts, guided by the law regarding such facts, but regardless of the legal effect of their conclusions. The issues of fact raised by the pleadings are to be passed upon by the jury. The legal conclusion to be drawn from such findings is to be referred to the court with an additional conclusion by the jury, express or implied, that if the court should be of the opinion, upon the whole case, as found, that plaintiff has a good cause of action, they find for the plaintiff, otherwise for the defendant. *Suydam v. Williamson*, 20 How. 427.

What has been said is in perfect harmony with the opinion in *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352. The difficulty there was that the specific acts constituting the breach of duty complained of, put in issue by the answer, were not found by the jury. The error assigned here is, that circumstantial evidence of the fact in issue was not found by the jury, which is quite another question. The reversible error found in *Bigelow v. Danielson*, 102 Wis. 470, was of the same character as that in *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215. The legal result which the plaintiff claimed for the specific acts of negligence set forth in the complaint was covered by the questions, instead of the acts themselves. It was to that situation that Mr. Justice BARDEEN used the language which the learned counsel for appellant, in their printed argument, press upon our attention to support their contention that the jury should have been permitted to find the evidence instead of the ultimate facts; that is, "when a special verdict was demanded, it became the duty of the court to submit these matters to the jury in

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such form that they might determine the facts so presented and not the conclusions to be derived therefrom." The term "these matters," in the quoted language, refers to facts set forth in the complaint,— facts constituting the negligence complained of,— which the special verdict in question here amply covered. The use which the learned attorneys for appellant make of the language of this court in *Ward v. C., M. & St. P. R. Co., supra*, is quite as unwarranted as that in the other case referred to. The error consisted of submitting the case for a general verdict, with a general charge in connection with a special verdict, when the right to the latter was exercised and a general verdict was excepted to. The submission of general questions covering specific facts in issue, with instructions confined to such questions, was said to be a proper practice, and that the instructions should go no further; that questions may be submitted covering facts essential to the main facts, though it is not error to refuse to do so.

With what has been said we leave this branch of the case. The matter has been discussed at considerable length because the attorneys for the appellant put much labor upon it and appear to think that recent expressions of this court, in connection with the history of the subject of special verdicts, support their assignment of error that the verdict here does not pass on all of the issues of fact. If the doctrine, pressed upon us as if it were a new subject for decision, that every issue of fact essential to the plaintiff's case must be passed upon by the jury by single, direct questions, in order to satisfy the right to a special verdict, be applied, as it must be, to issues made by the pleadings, all the suggested difficulties with reference to the form of the verdict complained of will quickly disappear.

It is hoped, if there is any doubt about the proper practice in submitting a cause for a special verdict,— if there exists any confusion that should be dispelled by this court,

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as is suggested by appellant's attorneys,— that what has been said will accomplish the desired result. It is not considered, however, that there is any such confusion. This court has iterated and reiterated the doctrine that special verdicts should consist of a sufficient number of plain, single questions, calling for direct answers, to cover the facts in issue on the pleadings and which must be found in the plaintiff's favor to make out his cause of action. *Bell v. Shafer*, 58 Wis. 223; *Kerkhof v. Atlas P. Co.* 68 Wis. 674; *Montreal River L. Co. v. Mihills*, 80 Wis. 540; *Ohlweiler v. Lohmann*, 88 Wis. 75; *Farley v. C., M. & St. P. R. Co.* 89 Wis. 206; *Haley v. Jump River L. Co.* 81 Wis. 412; *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352; *Bigelow v. Danielson*, 102 Wis. 470. So far there is no discretion in the trial court. The form of the questions is largely under the discretionary control of the court; and where the existence of concurring elements is necessary to an essential ultimate fact, or where such ultimate fact is dependent upon some one or more evidentiary facts, it is not error to refuse to submit questions covering such elements or minor facts; but in accord with the rule stated the court may confine the questions to ultimate facts, yet it may broaden out the verdict so as to cover essential elements thereof, or evidentiary facts. Such a verdict, containing a large number of questions covering mere minor facts and reasons for conclusions, has often been condemned, yet the ends of justice will no doubt often be promoted by questions not strictly necessary, which guide the jury by a logical process of reasoning to the proper conclusion as to the real subject of inquiry. *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279; *Schumaker v. Heinemann*, 99 Wis. 251; *Raymond v. Keseberg*, 98 Wis. 317. Further, it is proper, and on request it is error to refuse, to give instructions requested as to each question submitted, that may be reasonably necessary to enable the jury to answer it intelligently and according to

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the law governing the subject. But no instructions as to the effect of an answer upon the ultimate rights of the parties is proper. *Ryan v. Rockford Ins. Co.* 77 Wis. 611; *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215.

Defendant's attorneys requested the submission of a question covering the essential element of proximate cause, of whether defendant ought, in the light of attending circumstances, to have apprehended that the condition of the boiler might cause a personal injury to some person. That was refused, but a general question, covering the subject of proximate cause, was submitted in connection with instructions somewhat inaccurate but on the whole free from harmful error. The question submitted was as follows: "If you find that the boiler exploded by reason of a defect, in answer to question No. 5, then was such defective condition of said boiler the proximate cause of the plaintiff's injuries." The instruction was in line with the question in that it referred to the inquiry as being whether the *defect* which caused the explosion was the proximate cause of plaintiff's injuries. It is contended that a finding that the defective condition of the boiler was the proximate cause of plaintiff's injuries, is not a finding that defendant's negligence was the proximate cause of such injuries. The jury said that the conditions which caused the explosion, according to the verdict, are chargeable to defendant's negligence; that it knew of the defects, or ought to have known of them, and in the exercise of ordinary care ought to have apprehended that the result which followed in consequence of such defects might probably occur. That, in effect, found that the defendant's negligence was the proximate cause of plaintiff's injuries. The mere form of the finding, criticised in that the defect, instead of negligence, was referred to as the proximate cause, is of no consequence. The finding determined that the defendant was guilty of a negligent act in permitting the use of a dangerously defective locomotive; that its responsible

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officers and agents ought, in the exercise of ordinary care, to have apprehended an accident like that which occurred. That, clearly, in substance, found that the accident and the injury to plaintiff were the natural and probable results of defendant's actionable fault. All those things which were natural and probable defendant ought to have foreseen as likely to occur, and if, from the condition of the boiler, for which it was responsible, it ought reasonably to have apprehended the explosion as among the reasonable probabilities, then that event was a natural and probable result of its conduct. Under the circumstances, whether the term be used that the defect in the boiler, or defendant's negligence, was the proximate cause, is unimportant. Either means the same as the other. Strict accuracy is not required.

In the instructions the learned court several times spoke of the proximate cause as the direct and natural cause, instead of the natural and probable cause; but the error was not harmful, since language was used, several times, limiting the term "direct and natural" to what defendant, in the exercise of ordinary care, ought reasonably to have apprehended. It is somewhat strange that false notions of what constitutes proximate cause in the law of negligence became so grounded in many professional minds that the real philosophy of the subject cannot apparently be grasped and understood, notwithstanding the many clear elucidations of it given by this court, especially in recent years. A study of the following cases is commended: *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141; *Andrews v. C., M. & St. P. R. Co.* 96 Wis. 348; *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279.

Answers were allowed, against objections, to questions propounded to a witness, Dodge, called as an expert, as to what kind of an inspection such a boiler as the one in question should receive in order to determine its safety. Error is assigned on that, first, because the competency of the witness was not shown, and second, because the test of whether de-

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fendant failed to perform its duty was not whether it did what an expert, or person claimed to be an expert, in the examination of boilers might say was necessary to discover defects, but whether the defendant's conduct in the care of its boilers came up to the standard of persons generally engaged in the same line of business. The conclusive answer to the first contention is that the evidence abundantly shows that the witness was qualified to testify as an expert on the question of what is the proper method of inspecting boilers to discover such defects as were claimed to exist in the boiler in question; and to the second ground of objection, that while it is true that the test of ordinary care in the particular instance is what is generally done under similar circumstances, the defendant was not harmed by what the witness said was necessary or proper, because his testimony was in accord with that of defendant's witnesses. Dodge did not state how often boilers should be tested, but stated the nature of the inspection required to discover defects, particularly that of grooving. He said that the inspector should go inside of the boiler, the flues being removed, using a light, so that defects can be readily observed if there are any; that he should, using a hammer and chisel, remove all dirt. Defendant produced testimony that its practice was to inspect boilers for certain defects every thirty days, also to inspect the engine, to some extent, every round trip; also, at certain intervals, to give the boiler a general inspection by taking out the flues, going inside of the shell with a light and removing all scales and dirt, and looking carefully for imperfections. Testimony was also produced showing that such was the general custom of railroad companies. There was not an entire agreement between defendant's witnesses as to the customary frequency of inspection, but there was nothing out of harmony with the evidence of Dodge in regard to the character of the inspection. His evidence simply tended to show that the customary inspection of locomotive

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boilers, which was followed by the defendant, was in accord with what was reasonably required in order to discover defects if any existed. So the rule, that the standard of care for which defendant was responsible was that exercised by railroad companies generally, so far as such practice was not obviously insufficient, was not violated in the slightest degree by admitting the evidence objected to. If the custom established had not come up to the standard testified to by Dodge, there would be some ground for saying the admission of his evidence was harmful error, if objectionable upon any ground. But under the circumstances it tends to remove any possible claim that the general practice of the defendant was not free from negligence. Whether such practice was followed in the particular instance, and whether it was adequate considering the great age of the engine that caused the mischief, may be another question.

A witness of twenty-five years' experience in handling engines and machinery, and in observing the tendency of iron to become crystallized by age, was permitted, against objection, to give his opinion upon that point. That is assigned as error upon the ground that the witness was not competent to give such opinion evidence, because not schooled as a mechanic or experienced as a manufacturer. Neither was a requisite to the qualification of the witness. Practical experience, sufficient to fairly show that the witness possessed peculiar knowledge, rendering his opinion entitled to consideration as coming from a person possessed of more than ordinary information on a question properly the subject of opinion evidence, was sufficient. The witness came up to that standard.

The court permitted a witness, who appears to have been qualified to give opinion evidence, to testify regarding the limits of safe boiler pressure on the supposition that the boiler contained a groove or thin sheet clear around, reducing its thickness in the entire circumference to the extent



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of two thirds. That was clearly error. There was no evidence in the case to establish any such condition in regard to the boiler in question. The evidence on the subject was that there were grooves along seams, some being from twelve to fifteen inches in length. There was no proof of grooves along all the seams or clear around the boiler shell,—none whatever. If it were not for the fact that we are unable to see how the defendant could have been prejudiced by this testimony, as to the cause of the explosion, the admission of it would not only be fatal to the judgment, but a new trial would in any event be necessary. There is no controversy but that the boiler exploded because of imperfections, and that such imperfections consisted of what are called "grooving" and "pitting." True, the question of the existence of defects was submitted to the jury, as well as whether the explosion was caused thereby, but as we read the evidence the case on the part of the plaintiff was conclusive on both questions. No defense was made to it by the defendant, or explanation offered to otherwise account for the explosion, and no reasonable theory was advanced or exists, to account for the accident, except the imperfections found by the jury, and it appears that that must have been the cause. So, as we view the record, the introduction of the irrelevant evidence did not prejudice the defendant as to its legal liability, but it had a strong tendency to create in the minds of the jury a feeling that defendant's conduct was something worse than mere want of ordinary care,—something bordering on a reckless disregard of the safety of its employees. Experience shows that the minds of jurors are often influenced by such methods in cases where humble station is represented on one side of a controversy and wealth and power, especially that of a corporate organization, is represented on the other, the result often being that loss caused by a personal injury is measured, not by the legal standard of compensation alone, as it should be, but of ability to pay, with some

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element of punishment for the benefit of the plaintiff, as well. Whether there was such a departure from the correct standard in this case cannot be determined with certainty. It is sufficient for the appellant's purpose that the tendency was strong that way, and that a finding by the jury, made clearly contrary to the evidence, as will be shown later, pretty conclusively shows that they were unduly influenced by such irrelevant evidence, or some other cause. There was proof of one or two laminated spots on the under part of the boiler, not sufficient in extent, however, to materially weaken it. Moreover, such spots were in a different place from that where the rupture in the boiler plates occurred. We regard the proof as undisputed and conclusive that a weakening of the boiler by grooving and pitting caused the explosion, hence the evidence of what pressure would be safe for a boiler of three-eighths inch iron, grooved clear around two thirds of the way through, had no material effect upon the result of the trial as to defendant's legal liability. The real controversy as to defendant's responsibility was regarding whether its officers or agents knew or ought to have known of the weakened condition of the boiler.

A small portion of a boiler flue, taken from the wrecked engine, was offered in evidence to show that the flues were worn and weakened as alleged in the complaint. It is claimed that such evidence did not prove or tend to prove the existence of any condition which caused the accident; that the bursting of a flue would have reduced the pressure on the boiler shell instead of increased it. That is true. It is evident that the evidence was not offered to show a weakness in the boiler which caused the accident. The purpose, as it appears, was to show a generally worn-out condition of the boiler as bearing on the important question of whether defendant was guilty of negligence in regard to inspecting it for defects. A generally neglected condition of the inside structure of the boiler had a material bearing on that branch of the case. *McHugh v. Minocqua*, 102 Wis. 291.

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Opinion evidence was allowed of the probable time required for grooves to form in a boiler, two thirds through plates three eighths of an inch thick, and the effect of such defects, and of long-continued use, on the strength of the boiler. That was objected to, first, for want of qualification of the witnesses; second, because the hypothetical questions propounded to them did not present all the material facts testified to in the case. Neither ground of objection is sustained by the record. The witnesses were men of large experience in the use and inspection of boilers and in observing the effect upon them of the particular matters to which their answers were directed. The hypothetical questions referred to the age of the boiler, the length of time it had been in use, and the depth of the grooves. Those were the material points that had been testified to and substantially all of them. If there were other circumstances which would have affected the opinions, not theretofore brought out by the evidence, there was ample opportunity, by cross-examination, to place the information before the jury.

Photographs were received in evidence in respect to plaintiff's injured as compared with his uninjured leg. One photograph showed him sitting on a chair and the other standing, partially supported by a crutch and a brace on his injured leg. They were verified as correct representations by the artist who made them. They were taken by the jury to their room and examined there by them in arriving at the conclusion embodied in the verdict. There is a limit to the use of photographs as evidence, and it was nearly, if not quite, reached in this case. They are competent for some, but not for all, purposes. They may be used to identify persons, places, and things, to exhibit particular locations or objects where it is important that the jury should have a clear idea of the same, and the photographs will better show the situation than will the testimony of witnesses, and where the testimony of witnesses will be better understood by the use of

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photographs, and to detect forgeries, and to prove documents in cases where originals cannot be readily produced. There must be some substantial, legitimate reason for the use of such representations, else they should not be received. For the purposes indicated photographs have been frequently used for many years in the courts of this and other countries. *Church v. Milwaukee*, 31 Wis. 512; *Luco v. U. S.* 23 How. 515; *Blair v. Pelham*, 118 Mass. 420; *Marcy v. Barnes*, 16 Gray, 161; *Re Stephens*, L. R. 9 C. P. 187; *Malachi v. State*, 89 Ala. 134; *Duffin v. People*, 107 Ill. 113; *Maclean v. Scripps*, 52 Mich. 245; *Archer v. N. Y., N. H. & H. R. Co.* 106 N. Y. 589. On the occasion in question none of the reasons seems to have been present. There was no difficulty whatever in the witnesses describing the plaintiff's injured leg. The experts upon both sides did that. The leg might have been exhibited to the jury. However, in *Alberti v. N. Y., L. E. & W. R. Co.* 118 N. Y. 77, similar evidence was held proper, and in *Barker v. Perry*, 67 Iowa, 146, it was held proper to permit the jury to take photographs to the jury room. It is the general rule that courts have a broad discretionary control over what instruments of evidence the jury may have during their deliberations. *Starke v. Wolf*, 90 Wis. 434. We are unable to say that the defendant was prejudiced by the introduction of the photographs or the use of them complained of. As indicated, witnesses were present in defendant's behalf who had examined the injured leg, and must have known whether the photographs correctly represented it or not. Presumably they were correct representations, inasmuch as the artist who took them so testified, the descriptions given by the witnesses accord with them, and the defendant did not request that the jury should have a view of the injured member.

There are several other assignments of error, each of which has received careful consideration. None has been either overlooked or passed without study. The foregoing, how-

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ever, covers all questions that appear to be of sufficient importance to warrant special mention in this opinion, except the one regarding whether the finding of the jury, that plaintiff's spinal cord is permanently injured, is warranted by the evidence. The evidence bearing on that question is in substance as follows: Plaintiff testified that he was not conscious of any loss of sensation in any part of his body; that he could lie down flat upon his back and rise to a sitting posture without assisting himself with his hands, though it caused him some pain. After giving that evidence, and on rebuttal, when the importance of it became apparent, the plaintiff testified that he could not rise from a perfectly prone to a sitting posture without the use of his hands. Dr. Gill, for plaintiff, said he discovered that movements of the spinal column caused plaintiff pain in the region of the first, second, and third lumbar vertebræ; that there was tenderness at that point; that there was no injury to the spinal column itself, and no outward indication of injury; that an electrical test applied to the muscles showed that those on the right side, which are dependent for muscular energy upon the motor nerve having its root in the anterior horn of the spinal cord in the region of the first and second lumbar vertebræ, were impaired, indicating that the cord at that point was diseased; that there was, particularly, an absence of the patella reflex, a pretty certain indication of disease of the spinal cord at the point mentioned; that the roots of the motor and sensory nerves in the spinal cord are near together; that the fibers unite immediately after emerging therefrom, mix, yet preserve their identity, and travel together to the extremities of the muscles and tissues which they control; that an injury to the motor cells of the spinal cord, with no effect upon the companion sensory cells, is natural and probable; that it existed in this case; that in his opinion, plaintiff's spinal cord in the region of the first and second lumbar vertebræ is permanently injured. He further

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testified that the plaintiff performed the feat of rising from a prone to a sitting posture without the aid of his hands. Dr. Rodney Fox, who assisted in an examination of the plaintiff, testified that he discovered no indication of spinal-cord injury; that he did not make a special examination therefor, but that in his opinion, from what he observed, plaintiff was not suffering from such an injury. The witness's testimony was based on having treated plaintiff for his injuries, on having examined him personally several times, and been present and assisted at an examination of him three days before the trial. He said that he did not at any time discover any injury to any portion of the spinal column or cord. Dr. Philip Fox testified that he treated plaintiff for his injuries, saw him on an average of twice a week for a couple of months after the accident, and assisted at the examination three days before the trial; that nonuse of his right leg would account for all conditions found by Dr. Gill which he attributed to a spinal-cord injury; that in his opinion it was impossible that plaintiff could be suffering from such an injury, manifested only by impairment of the functions of the motor nerves; that in his experience he had never known of a case of diseased spinal cord without sensation as well as motion being affected; that if one's left arm be kept out of, and the other arm kept in, use for a month, the difference in the conditions of the two arms would be found quite similar to that found by Dr. Gill in plaintiff's legs; that other causes than spinal-cord injury will show a difference in the conditions of corresponding muscles under an electrical test. Dr. Sifton testified that he made a careful examination of the plaintiff three days before the trial; that he had seen and examined him several times previous to that; that in his opinion he was not suffering from any injury to the spinal cord; that such an injury in the region of the first and second lumbar segments, affecting motor functions only, was impossible; that the anterior or motor

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nerve roots are so near to the sensory nerve roots that it is practically impossible to so disturb the substance of the cord as to affect one and not the other; that no such case has ever been recorded; that in all spinal-cord injuries he had observed there was always a disturbance of motor as well as sensory functions; that in arising from a prone to a sitting posture four muscles, two on each side, are brought into use, principally, and that the nerves controlling them come from the spinal cord through the second and third lumbar fringes and second and third lumbar vertebræ; that an injury at that point, affecting the motor cells, would destroy them; that there can be no such thing as partial destruction of nerve cells; that there are no instances of disease of the spinal cord so limited to the motor nerve cells on one side as to show no other disturbance; that such a thing is practically impossible; that the absence of patella reflex, as testified to by Gill, was a natural result of the atrophied condition of the plaintiff's leg from nonuse; that absence of such reflex may or may not indicate spinal-cord injury; that, alone, it does not indicate such an injury; that it may be entirely absent and the spinal cord be in a normal condition.

Three physicians, testifying on the side of the defendant, apparently of equal ability, credibility, and opportunities with the witness on the side of the plaintiff for knowing the latter's condition, were in harmony on the point that plaintiff was not suffering from any injury to the spinal cord. In support of their opinion are the facts that plaintiff can arise from a prone, or nearly a prone, position to a sitting posture without the aid of his hands; that such feat requires the use, to about the utmost limit, of muscles in a normal condition, controlled by motor nerves having their roots in the spinal cord in the region of the first and second lumbar vertebræ, the point of alleged permanent injury; that a condition of the muscles, requisite to the exertion plaintiff is capable of making, is inconsistent with an impairment of the cord; that

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the sensory cells of the cord at the alleged point of impairment are in a normal condition, as evidenced by there being no loss whatever of sensation in any part of the muscles dependent therefor upon the sensory nerves centering in the cord at such point; that the motor nerve root has a companion sensory nerve root located in close proximity to it, and that the two species of nerve fiber mix upon leaving the spinal cord, though preserving their respective identities, travel together, and permeate the muscles they control, rendering it highly improbable that the cord can be impaired at the motor root without impairment of its companion nerve; that nonuse of the muscles of the plaintiff's right leg would naturally cause an abnormal condition of such muscles, which would be manifested by such electrical tests as those from the results of which plaintiff's witness concluded that the spinal cord was permanently impaired. These facts, and the improbability mentioned, constitute almost, if not quite, a demonstration that the plaintiff's spinal cord is not diseased. Mere opinion evidence, at best, is to be received and scrutinized with the greatest care. It is, ordinarily, the most uncertain kind of evidence that can be produced, and falls to the ground as utterly worthless when inconsistent with undisputed facts or with reason and common sense as applied to other credible evidence.

We might proceed at great length to discuss the evidence of the four experts and show that the evidence of those who agreed that plaintiff's spinal cord is in a normal condition, independent of the physical facts established, preponderates clearly against the contrary view; but that is not necessary, nor would it be helpful in future litigation, because mere preponderance of evidence is not sufficient to warrant sustaining the assignment of error. The situation, as we view it, is this: The finding of the jury that plaintiff's spinal cord is permanently impaired rests upon the uncorroborated opinion of one witness, which is inconsistent with, and dem-

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onstrated to be wrong by, undisputed facts and all the reasonable probabilities, besides being opposed by three equally competent witnesses whose evidence is in harmony with such facts and probabilities. In such a situation a verdict cannot stand. *Badger v. Janesville Cotton Mills*, 95 Wis. 599; *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277; *Cawley v. La Crosse City R. Co.* 101 Wis. 145; *Wunderlich v. Palatine F. Ins. Co., post*, p. 382. Opinion evidence alone is not conclusive in any case. The jury must pass upon the probabilities, and unless the opinion relied on is within the scope of reason and common sense it should not be regarded at all. If that were not so, injustice would often rule in the jury room, because, in a case like this, or any case involving a personal injury, there is no theory so preposterous but that men can be procured to support it under oath from the witness stand by expert evidence. On questions involving skill and experience in such matters, experts must be called from the necessities of the case, for want of better evidence; and when stripped of all the elements of mere conjecture, and pretense, and partisan influence, it is valuable, and what is left will rarely appear improbable to ordinary comprehension. It is the duty of courts and juries to do that,— to subject expert opinions to all reasonable tests to determine their credibility. In doing that here, we find that the opinion that plaintiff's spinal cord is diseased in the region of the first and second lumbar vertebræ, based on the fact, principally, of a loss in the contracting power of the muscles controlled by the motor nerve which proceeds from that point is not reasonable, because no impaired condition of the companion sensory nerve fiber exists, because some of the muscles, controlled by the same motor nerve that controls those showing weakness, are in a normal condition; that it is neither reasonable nor possible that the nerve root can be impaired and some of the muscles controlled by it remain in their normal condition. On the other hand it is plainly

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reasonable that nonuse of muscles will result in loss of muscular energy and of contracting power, evidenced by an electrical test, and that a normal condition of muscles, in daily use, and abnormal condition of those long out of use, both sets dependent upon the same source for motor energy, render it highly probable that nonuse, and not a disease of the nerve at its source, is the cause of the abnormal condition. Thus, the two processes of reasoning reach the same result,— that the opinion that the spinal cord is diseased is mere conjecture, or the result of false reasoning, or of that bias which experience shows so often takes hold of a skilled witness with apparently resistless power.

As before indicated, the ease with which experts can be arrayed on each side of a controversy, especially where the human anatomy and human afflictions, their cause and probable results, are the subject of judicial inquiry, and two theories be sustained by the evidence of reputable men skilled in their calling, each theory fitting with exactness the necessities of the side on which it is advanced, is an unexplainable mental phenomenon which all have experienced who have had much to do with the trial of cases. It leads to the adoption, as a rule of law, of the expression of Lord CAMPBELL, often quoted by text writers, that skilled witnesses come with such a bias on their minds that hardly any weight should be given to their evidence. *Tracy Peerage*, 10 Clark & F. 191. It seems that if a person is called as a witness to support one side of a controversy by opinion evidence, he is quite likely to espouse such side with all the zeal of blind partisanship, to view the situation from the point of interest and necessity of that one side of the controversy with such a degree of mental concentration as to shut out of view everything not within that narrow focus, inducing a mental condition of entire incapability of giving an independent, impartial opinion, and capability only of acting in the line which the interest of the one side suggests, with as much

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certainty as the hypnotized follows the mental suggestion of the hypnotizer. Many courts have had occasion to speak of this, and, while maintaining the importance of expert evidence, have condemned in strong language its abuse, and urged the importance of weighing it with the greatest caution and not accepting it as controlling where inconsistent with reason and common sense. Wharton, Ev. § 454, and cases cited; *Winans v. N. Y. & E. R. Co.* 21 How. 88; *Ware v. Starkey*, 80 Va. 204; 1 Taylor, Ev. § 58; *Grigsby v. Clear Lake W. W. Co.* 40 Cal. 396.

In the last case cited, Mr. Justice TEMPLE, who delivered the opinion of the court, said, speaking of expert witnesses, "It must be painfully evident to every practitioner that these witnesses are generally but adroit advocates of the theory upon which the party calling them relies, rather than impartial experts upon whose judgment and learning the jury can safely rely." In the same line, Mr. Justice GRIER remarked, in *Winans v. N. Y. & E. R. Co., supra*, in substance, experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that their examination results in perplexing, rather than elucidating, the questions involved in a case.

In the light of what has been said it will not do to rely upon such fallible instruments of evidence as mere opinions, when in conflict with reasonable probabilities. Otherwise there will be no safety in submitting one's rights to the determination of a jury in a court of justice. Opinions of experts must be tested by the same methods as other evidence for the purpose of determining their credibility, keeping in view that one fact is of greater weight than any amount of theory, and so is one probability of greater weight than any amount of conjecture.

What is here said should not be taken as disparaging at all the legitimate use of the results of study and experience in special lines. Such results are very helpful, and in some

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cases absolutely necessary, in judicial search after truth. When a skilled witness can be kept within his legitimate sphere of impartiality, like a jury or a judge, his evidence will elicit the respect, which is due from all, to the results of study and experience.

We find no reversible error, except the finding that plaintiff's spinal cord was injured and that such injury is permanent, and the allowance of prejudicial, irrelevant evidence of the witness Dodge. For such errors the judgment must be reversed. It would be unfortunate, however, to leave the cause so that a new trial, at all events, would be necessary, since the liability to compensate plaintiff for the injuries he actually received is established without reversible error. Such injuries were of a very serious and painful character, consisting of burns upon the face, neck, head, the upper part of the breast and back, cuts and bruises upon the head and other portions of the body, a very bad fracture of the leg, both bones being broken in several places and the tissues at the points of fracture being so crushed and torn as to nearly sever it, and a shortening of the injured leg one and one-half inches. The character of the injuries was such as to cause plaintiff the most excruciating pain, to wholly disable him from labor for a considerable length of time, at least down to the time of the trial, over a year after the accident. His ability to labor in the future is unquestionably permanently impaired to some extent. He was twenty-nine years of age when injured, and capable of earning from $900 to $1,000 per year. The damages assessed, including that for a permanent injury to the spinal cord, were $11,500. Now it is impossible, of course, to determine with precision what part of that sum was assessed for loss caused by injury to the spinal cord, but a sum may be named that, in all reasonable probability, it does not exceed, and, if deducted from the total, the defendant will have no reason to complain, conceding its liability for the injuries as to which there is no controversy.

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To determine a basis for the remission from a verdict of sufficient to cure an error of including therein compensation for an injury that does not in fact exist, is not attended with such difficulty as that for curing an error which merely prejudices the jury, causing them, in assessing damages, to depart from the basis of compensation for actual loss. We have both situations in this case. It is settled that a verdict, excessive, resulting from passion or prejudice, can be cured by consent on the part of the plaintiff to such a reduction as in the judgment of the court will, with reasonable certainty, save the rights of the defendant. *Gillen v. M., St. P. & S. S. M. R. Co.* 91 Wis. 633. The practice of thus curing errors going only to the amount of damages is constantly broadening in the interest of justice and public economy. In *Potter v. C. & N. W. R. Co.* 22 Wis. 615, this court said that the rule should not be applied where the excess cannot be clearly ascertained; that to do otherwise would substitute the judgment of the court for that of the jury. *Corcoran v. Harran*, 55 Wis. 120; *Baker v. Madison*, 62 Wis. 137; *Gillen v. M., St. P. & S. S. M. R. Co., supra; Donovan v. C. & N. W. R. Co.* 93 Wis. 373. True, in some of the later decisions the expression may be found that the court will not order a *remittitur* unless the excess in the verdict can be definitely ascertained; but it will be found that such expression refers to ordering a reduction of the amount of the recovery and a judgment accordingly, without the consent of either party. Expressions will also be found to the effect that where a verdict contains improper elements, so that they cannot be separated with certainty from the proper elements of damages, the court cannot do otherwise than to order a new trial, because any other course would be substituting its judgment for that of the jury, apparently going back to *Potter v. C. & N. W. R. Co., supra*, unless the particular situation under consideration be understood. See *Reed v. Keith*, 99 Wis. 672. Attention will reveal the situation to have been, that there were no data

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from which the court could fix a sum reasonably certain not to exceed assessable damages, leaving it for the plaintiff to accept or reject it; or the expression was used with reference to ordering a judgment for a sum less than the verdict, without the consent of either party. The rule here discussed is a rule of justice between parties, and to the public that has to bear in great part the burdens of litigation, as well. As stated, in substance, in *Baker v. Madison*, 62 Wis. 137, when plaintiff has demonstrated his right to recover, so there remains no reason to suppose that a new trial will do more than to change the amount of the verdict, the ends of justice will not be promoted by a new trial, nor is such a trial necessary to vindicate the rights of either party if plaintiff will consent to reduce his damages to the proper sum. In *Donovan v. C. & N. W. R. Co.* 93 Wis. 373, the practice was as broad as this.

The idea that the practice above discussed usurps the function of the jury has been rejected by most courts, and upon grounds that are unquestionably sound. Suth. Dam. § 460. There is no good reason to restrict the practice so as to exclude any case, whether on contract or sounding in tort, where plaintiff is clearly entitled to recover and a sum can be named which, in all reasonable probability, will not exceed the amount which a jury will ultimately give to him. If the court can name that sum, where the verdict is the result of passion and prejudice so as not to furnish any guide whatever, it certainly can in most cases where the only defect is that an element has been included improperly. There is nothing in *Eviston v. Cramer*, 57 Wis. 570, or *Reed v. Keith*, 99 Wis. 672, inconsistent with this. The court in those cases could not determine whether the improper element entered into the verdict or not. There were no data by which the amount awarded for proper elements could be determined. Here the injuries measured by the verdict are certain, the principal trouble being that one element was included contrary to the evidence. The amount apportioned

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to that can be justly determined, resolving doubts in favor of the defendant, and the balance be reduced so as to cure, in all reasonable probability, the error of permitting irrelevant evidence, which tended to show a greater degree of disregard for the safety of defendant's employees than it was guilty of, thereby prejudicing the jury against the defendant. In our judgment, a reduction of the plaintiff's compensation to $7,000 will cure the errors referred to so far as in any reasonable probability they prejudiced the defendant. A permanent injury to the spine, such as the witness Gill testified to, is a very serious matter, but we are constrained to believe, from the whole case, that though the jury found the existence of such an impairment, it was so involved in mere conjecture that the undisputed injuries, which may well account for the main part of the verdict, were the chief consideration for it in their minds. In this we do not determine what will adequately compensate plaintiff for his injuries. We simply determine what amount of the $11,500 was probably assessed by the jury for plaintiff's actual injuries, keeping in mind the probable departure by the jury from the legal standard of compensation by reason of prejudicial, irrelevant evidence, and making a proper reduction for that.

It is considered that the disposition made of this case does extend materially, if at all, the practice of avoiding a new trial where a diminution of the amount of the verdict will cure prejudicial errors. It is, at most, but an application of well-known and established principles to new situations. But, if it shall appear to be an extension of such principles, it should not be taken as indicating a tendency to invade or narrow the functions of the jury, but rather as indicating that our jurisprudence is still developing toward that ideal of perfection where the administration of the law is truly the administration of justice.

*By the Court.*—The judgment of the circuit court is reversed, and the cause remanded for a new trial, but with an

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option to the plaintiff, however, to avoid such new trial by electing, within twenty days after the filing of the *remittitur*, to take judgment against the defendant for the sum of $7,000 and costs.

BARDEEN, J. I dissent from the majority opinion on the ground that the admission in evidence of the broken boiler flue was improper and prejudicial to defendant. The negligence of defendant was found to consist in its using a boiler that had become "pitted and grooved." The "weakened, worn, thin, cracked, broken, and insecurely patched" flue is not claimed to have had anything to do with the explosion, and it therefore had no tendency to support the plaintiff's case. Because the flue presented a weakened and defective appearance, the jury might have been led to infer that other portions of the boiler, not seen by them, were equally unsafe. No such inference was proper, because it had no tendency to show the boiler plate was weakened or unsafe.

Giving the plaintiff an option to remit a portion of the damages, admitting that the evidence mentioned was not improper or prejudicial, is going beyond any precedent in the books. It comes so close to the line of usurpation by this court of the functions of the jury that I do not feel like sanctioning the precedent.

DODGE, J. I cannot persuade myself that the question of defendant's care or negligence has been submitted to or passed upon by the jury in this case. The only questions answered (both affirmatively) in the special verdict were — first, whether the explosion occurred by reason of pitting and grooving of the boiler shell; second, whether the defendant "could" have discovered such defects by reasonable care, tests, or inspection before the explosion. Defendant offered evidence that it did not in fact know of such defects,



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which was rejected, and that it had exercised due and customary care in the way of inspection and repair *within reasonable and customary time before the accident.* Defendant's liability depended on its negligence, not on the existence of defects. Of course, use of the appliance with knowledge of the defect, if obviously dangerous, would be negligence, but that is not in this case. Defendant accepted the burden of proof imposed on it by sec. 1816, Stats. 1898, and offered to disprove knowledge; and knowledge is not found by the verdict. So that the only remaining phase of negligence was the omission of reasonable and customary inspection or tests, as to which testimony was copiously introduced on both sides. So I think that question should have been submitted. If judgment may go against defendant upon the facts found in this verdict, the employer becomes an insurer against every defect in his appliances which could be discovered by an inspection or tests made the moment before an accident occurs, and the question of his due and reasonable care as to frequency of inspections is eliminated. I can see no reason why that is not an element of due care, just as much as is the thoroughness of the inspection when made. The question is, What precautions do ordinarily careful men exercise under like circumstances? A steam boiler cannot be, and in the exercise of ordinary care is not, disemboweled and its interior carefully examined every time steam is to be generated therein, but at intervals. The competent employee knows that, as well as the employer, and he takes the risk of those defects which may develop and cause injury, notwithstanding such inspections at such intervals. He has a right to expect ordinary care, but that is all. In the light of what I have said as to the refusal of the court to permit the jury to find whether the defendant either knew of the defect or was guilty of any negligence in inspection to discover it, I think the question submitted and answered as to proximate cause was insufficient. Doubtless, where a

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defendant knows of such a defect as here existed, it is sufficient to find that defect the proximate cause of the injury; but where it does not appear that he knew of it, and it is apparent that the defect has developed since the last inspection, the question whether, in the light of experience and of the customs of others, such defect might reasonably have been expected to develop, so as to make a more recent inspection necessary, should have been passed upon by the jury.

I also concur in the views expressed by Mr. Justice BARDEEN as to the impropriety of admitting in evidence the piece of flue.

For these errors I think the cause should be remanded for a new trial. If it were not for them I should concur in the conclusions of the court as to the propriety of allowing judgment to be entered for $7,000, at the option of the plaintiff, as a reasonably certain correction of the erroneous awarding of damages for the unproved injury to the spinal cord.

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KLEINER, Appellant, vs. THE CITY OF MADISON, imp., Respondent.

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*September 29 — October 20, 1899.*

*Municipal corporations: Defective sidewalk: Covering over cement walk.*

An apron or covering over a cement sidewalk, placed there in the winter time when the walk became slippery, was constructed of pine boards laid lengthwise of the walk and fastened to pine cleats laid crosswise, the entire thickness being less than two inches. There was no beveled plank leading from the cement to the top of the covering, but the ends of the boards were sawed off square and the cleat did not come out flush therewith. *Held*, that such covering did not constitute an actionable defect in the sidewalk.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

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The facts are stated in the opinion.

For the appellant there was a brief by *Olin & Butler*, and oral argument by *H. L. Butler*. They contended, *inter alia*, that at a point where it would be least expected or anticipated a two-inch obstruction had been created, which the expenditure of a few cents in the placing of a beveled strip or other contrivance along the end of the walk would have avoided. It was error for the trial court to hold, as matter of law, that such obstruction did not constitute a defect. *Morrison v. Madison*, 96 Wis. 452; *George v. Haverhill*, 110 Mass. 506; *Marvin v. New Bedford*, 158 Mass. 464; *Holmes v. Drew*, 151 Mass. 578; *Baxter v. Cedar Rapids*, 103 Iowa, 599; *Pittenger v. Hamilton*, 85 Wis. 356; *Schroth v. Prescott*, 68 Wis. 678; *Koenig v. Arcadia*, 75 Wis. 62.

For the respondent there was a brief by *John A. Aylward*, city attorney, and *R. M. Bashford*, of counsel, and oral argument by *Mr. Aylward*.

CASSODAY, C. J. This action was commenced May 2, 1898, to recover damages sustained by the plaintiff February 17, 1898, at 7 p. m., by falling upon an alleged defective sidewalk in front of the defendants Kaiser's on Pinckney street in this city. Issue being joined and trial had, at the close of the testimony the court directed a verdict in favor of all the defendants, and from that part of the judgment entered thereon in favor of the city the plaintiff appeals.

It appears from the record and is undisputed, in effect, that the residence of the defendants Kaiser was on the westerly corner of Dayton and Pinckney streets; that a year or two prior to the accident the Kaisers had constructed a granolithic or cement sidewalk, six feet wide, by the side of their premises on Dayton street; that the same was nearly level; that they also constructed the same kind of a sidewalk, six feet wide, in front of their residence on Pinckney street, connecting regularly with the sidewalk on Day-

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ton street, and that the same descended slightly toward the northwest, corresponding with the descent on Pinckney street; that some time prior to the accident, and when the weather was cold and the sidewalk had become slippery, the Kaisers had an apron laid upon the sidewalk on Pinckney street in front of their house, which had been constructed of pine boards about an inch in thickness laid lengthwise the sidewalk, and fastened to pine cleats which rested upon and lay crosswise the sidewalk; that the boards and cleats together were less than two inches in thickness; that there were three of these sections, with the ends fastened together by cleats; that the end toward Dayton street came to within two or three feet of the sidewalk on that street; that the plaintiff, who was fifty-four years of age, started, on the evening of the accident, to go from the Ogden corner to the house of a relative on that street; that in crossing Dayton street the walk was narrow by reason of the snow, and that she walked ahead, and the daughter who was with her walked behind; that there was no electric light at that corner, and it was quite dark; that it was not slippery enough to interfere with walking; that when she got to the upper end of the apron, near Dayton street cross walk, she struck her foot against or under the end of the projecting apron, and fell and injured herself badly.

The testimony is voluminous, but the essential facts are substantially as stated. There is no claim that the granolithic walk was defective in its construction, either in its slope, descent, or otherwise. It is said there was some ice and packed snow accumulated under the apron, elevating the same somewhat above the usual and proper level. Manifestly, the very object of putting down the apron was to save travelers from slipping upon ice liable to accumulate upon such cement walk. There appears to have been a thin scale of ice on the granolithic walk, outside of the apron, from one eighth to one fourth of an inch in thickness.

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But the plaintiff did not slip on the walk, and hence the ice and snow in no way contributed to the injury, unless it was by slightly elevating the apron above the cement. There is evidence that one of the boards on the top was quite ragged and splintered,—a large piece splintered out of the center board; but, as that in no way contributed to the injury, it is eliminated from the controversy. The only defect, if any, in the apron which in any way contributed to the injury was that the ends of the boards at the upper end of the apron toward Dayton street were sawed off square, that the cleat did not come out flush with the ends of the boards, and that there was no beveled plank or piece leading from the cement walk up to the top of the apron. As indicated, the whole thickness of the apron, including the cleats and covering, did not exceed two inches. The trial court held, as a matter of law, that the apron was a proper covering of the cement sidewalk to protect pedestrians from the danger of the slippery condition of the walk, and that such apron did not constitute an actionable defect in the sidewalk. We all concur in that opinion. Neither the city nor lot owners are bound to keep sidewalks at all times in a condition of absolute safety, but only reasonably safe. In cold weather, sudden changes in the condition of sidewalks, in consequence of snow and ice thawing and freezing are liable to occur, and reasonable care is all that can be expected of the city or lot owners. We find no issue of fact which the court was required to submit to a jury. We have not searched for authorities. The facts are undisputed. The case is very simple. If there are any adjudications requiring such a case to be submitted to the jury, we decline to follow them.

*By the Court.*—The judgment of the circuit court is affirmed.

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YOUNGBLUTH, Appellant, vs. STEPHENS, Respondent.

*September 29 — October 20, 1899.*

*Master and servant: Personal injury: Contributory negligence.*

Plaintiff, a boy about seventeen years old, had worked for two seasons in defendant's brick yard, and during that time, for a day or two at least, had operated the cars on a small railroad used to haul clay out of the clay pit, which were drawn by a wire rope winding around a drum operated by an engine. These cars could be stopped by the brake and by signal to the engineer. At the time of the accident plaintiff was operating a car, and was standing on its front platform by the brake as it was drawn up the incline from the pit. The rope in some manner caught under the end of one of the boards which formed a walk between the rails, raising such board so that, as the car advanced, it struck and broke plaintiff's leg. Plaintiff was riding with his back to the rope, although he knew of the dangers to be anticipated therefrom and had on this very trip been cautioned to turn around and look at the rope. *Held*, that he was guilty of contributory negligence.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This is an action to recover for personal injuries suffered by the plaintiff while in the employ of the defendant in the defendant's brickyard on the 4th day of May, 1894, the plaintiff being then a minor of the age of sixteen years and eleven months. The accident happened while the plaintiff was operating a loaded car running on a small railroad track in the defendant's brickyard, which was used to haul clay up out of the clay pit. It was drawn by a wire rope or cable winding around a drum, which was operated by a steam engine. The railroad in question had a gauge of about two feet, and ran from the engine house, where the brick-making machinery was, west along the general surface of the ground on a slight incline to the top of the clay pit, and then down a steep incline, over a trestlework, into the pit, until it arrived at the bottom, and then, curving a little

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to the north, ran a distance of about 100 feet to the turntable, from which several tracks radiated to the places where the shovelers filled the cars. There were two small cars in use upon this road. The frame of each car was about seven feet long and about three feet wide; and the box, which was arranged to dump upon one side, was about five feet square. The wheels were twelve inches in diameter, and were supplied with brake shoes operated by a brake in the front of the car. The frame of the car extended out at each end, beyond the box, several inches, and afforded a place whereon an employee might stand and operate the brake. The distance from the drum at the top of the railway to the turntable was a little over 400 feet. From the bottom of the trestle to the turntable was about eighty feet, and in this place the grade descended from the turntable to the trestle so that loaded cars ran by gravity to the bottom of the trestle. There was a board walk laid between the rails where the track ran over the trestle, for employees to walk on. About two weeks before the accident this walk had been repaired, and it was claimed by the plaintiff that the boards were loose, and that the ends overlapped each other, so as to afford an opportunity for the wire rope to get under the loose ends of the boards. On the part of the defendant the evidence tended to show that the boards were firmly nailed down in their places.

There was, as has been said, a slight curve in the track, beginning at the point where it reaches the bottom of the pit, where the grade changes from a descending to an ascending one. As the result of this slight curve, when a car began to be pulled up from the turntable by the rope, the rope would slam down on the boards, and sometimes strike a pole set on the outside of the track in the curve, which pole was placed there for the purpose of keeping the rope from going too far over the ends of the ties. The car could be stopped by the brake and by signal to the engineer who operated

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the drum at the top of the railroad. The testimony tended to show that the plaintiff worked in the brickyard in the year 1892 during the entire summer, and also during 1893, and during 1893 the railroad and its appliances were the same as at the time of the accident; that he ran the car at least a day and a half or two days in the year 1893, and perhaps more. It appeared from the plaintiff's own evidence that the brake on the car was in good order, and that he knew how to operate it, and that he knew that the flapping of the cable when the car started might be dangerous.

On the day of the accident the plaintiff was set to work operating the car drawing clay up to the engine house. He had run the car up and down about half a dozen times before the accident. According to his own testimony, at the time when the accident happened he started from the turntable standing on the front of the car, on the right-hand side of the brake, with his hand on the brake, facing the way the car was going. When the car got on the trestlework, the rope "got playing with the boards" which formed the walk between the rails, and got in under the end of one of the boards, and lifted up the end above the platform of the car, so that, as the car advanced upward, the end of the board struck the plaintiff's leg and seriously injured it. The plaintiff made no effort to stop the car by brake or signal, but some other employees saw the difficulty, and the car was stopped, but a compound comminuted fracture of the leg had already taken place. On the part of the defendant several witnesses testified that the plaintiff at the time of the accident was standing with his back in the direction in which the car was moving, so that he could not see up the track, and that he was cautioned by the foreman of the pit, when the car started, to turn around and look the way it was going, but that he told the foreman to mind his own business.

The negligence charged in the complaint consisted in fail-

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ure to inform the plaintiff of the dangers, and in leaving loose boards between the rails, and in not having a sufficient platform for the plaintiff to stand upon.

The jury returned the following special verdict: "(1) Was the board under which the cable caught securely nailed to the ties? *A.* Yes. (2) Did the board under which the cable caught meet the next board to the west at the center of a tie, without overlapping? *A.* Yes. (3) Was there any defect in the board walk between the rails at the place of accident? *A.* No. (4) If you answer 'Yes' to the last question, then state in what such defect consisted. (Not answered.) (5) If your answer to question three is 'Yes,' then state whether said walk was constructed, or caused to be constructed, by the defendant or his foreman, with such defect therein. (Not answered.) (6) If you answer 'Yes' to question three, then state whether the defendant knew of such defect before the accident. (Not answered.) (7) If you answer 'Yes' to question three, then state how long such defect existed before the accident. (Not answered.) (8) If you answer 'Yes' to question three, then state whether the defendant, in the exercise of reasonable care, should have discovered and remedied the defect before the accident. (Not answered.) (9) Did the defendant cause the board between the rails of his railroad, at the place of accident, to be so laid as to make it a reasonably safe place to operate the car by the cable in question? *A.* Yes. (10) Did the plaintiff ride from the turntable to the place of accident with his back to the cable and his face towards the turntable? *A.* Yes. (11) Was the plaintiff in the position mentioned in the last foregoing question when he was injured? *A.* Yes. (12) Was the plaintiff told by Mr. Hanck, at or about the time of the starting of the car, to turn round and mind the cable? *A.* Yes. (13) At what speed was the car running from the time it started until the accident? *A.* We do not know. (14) Was there a platform

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on the car on which the plaintiff was riding? *A.* Yes. (15) Could the plaintiff, in the exercise of reasonable care and prudence, have escaped injury by jumping from the car in question? *A.* Yes. (16) Was the plaintiff guilty of any want of ordinary care which directly contributed to cause the injury he complains of? *A.* Yes. (17) If you find, in answer to question three, that there was a defect, then state whether such defect was the proximate cause of the plaintiff's injury or not. (Not answered.) (18) If, upon your answers to the foregoing questions, the court decides that the plaintiff is entitled to a judgment, at what sum do you assess the plaintiff's damages? *A.* $2,000."

Upon this verdict judgment for the defendant was rendered, and the plaintiff appeals.

For the appellant there was a brief by *Bushnell & Hall*, and oral argument by *A. R. Bushnell* and *F. W. Hall.*

For the respondent there was a brief by *Olin & Butler*, and oral argument by *H. L. Butler.*

WINSLOW, J. Many exceptions are preserved in the record to rulings made upon the trial, but as they do not affect the question which we deem decisive of the case, it will be unnecessary to notice them. By their answers to questions 10, 11, and 12 of the special verdict, the jury found that the plaintiff, although warned by the foreman of the pit, when the car started, to turn around and mind the cable, rode from the turntable to the place of the accident with his back to the rope, and was in this position when the board struck him. These facts are found without error. They dispose of the case, because they convict the plaintiff of contributory negligence. He was almost seventeen years of age. He had worked in the yard two previous seasons. He knew that whatever dangers there were in the operation of the car were such as were in some way connected with the rope, and he persistently refused to look at the rope, or look

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in the only direction from which danger might come, although expressly warned to do so. If this be not contributory negligence, we should not know where to look for it. We have carefully examined the record, and find these answers of the jury to have been based upon entirely sufficient evidence. Nor do we find any errors either in the rulings upon evidence or in the instructions of the court which can affect these answers. They are, therefore, verities in the case, and are decisive against any recovery by the plaintiff.

However, even if the case were not disposed of by these findings, it would still be disposed of adversely to the plaintiff by the fact that no negligence on the part of the defendant was proven. The negligence charged was (1) failure to warn the plaintiff of the dangers; (2) leaving loose boards between the rails; and (3) providing no sufficient platform for the plaintiff to stand upon. The plaintiff's own evidence shows that the plaintiff had fully as much knowledge of any dangers which might be anticipated from the rope as any one, and further the verdict finds that he was cautioned to watch the rope upon this very trip. The evidence fails to show that the width of the platform aided in any way in producing the injury, and the answers to the first three questions of the verdict show that there was no negligence in the securing of the boards between the rails. We have found no erroneous rulings which call for a new trial upon either of these points. These considerations render it unnecessary to discuss the various rulings in detail.

*By the Court.*— Judgment affirmed.

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# HART and others, Appellants, vs. MOULTON, Sheriff, Respondent.

*September 29 — October 20, 1899.*

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*Replevin: Provisional remedy not essential to action:* Res adjudicata: *Parties and privies: Sale of chattels: False representations: Intent to defraud.*

1. The provisional remedy in a replevin action under the Code, to obtain immediate possession of the subject of the controversy, is not essential to the commencement or maintenance of the action, hence any error in such proceeding does not affect the jurisdiction of the court to entertain such action and proceed therein to judgment.
2. One Nelson obtained possession of property from plaintiffs by inducing them by false representations to sell the same to him. Part of such property Nelson thereafter sold to innocent third persons, and the balance was taken on an execution issued to enforce a judgment against him. Subsequently, plaintiffs rescinded the sale for fraud and commenced this action against the officer to recover possession of the property held by him, and a second action against Nelson for damages in respect to the property that could not be recovered by reason of its having been sold by him to innocent third persons. The action for damages proceeded to judgment. Such judgment was offered in evidence on the trial in this action as binding upon the defendant, on the ground that he could claim no better right than Nelson. The evidence, on objection, was ruled out. *Held*, that the ruling was proper, first, because if defendant obtained any interest in the property in controversy it vested in him before the commencement of the action against Nelson; and second, because the property in controversy in this action is not the same property in controversy in the action against Nelson.
3. The doctrine of *res adjudicata* extends to and binds privies of the parties to the litigation as well as the parties themselves, but privity, under such rule, exists only in relation to the subject matter of such litigation. The decision in an action becomes a rule of property as to the subject matter thereof and passes with it to all persons subsequently claiming under such parties, but does not attach to any other property, the limit of its effect as to privies being the limit of the particular property, property right, subject matter, or thing involved in the litigation.
4. A sale of property procured by false representations, and a purchase with existing intent on the part of the purchaser not to pay for the

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subject of his purchase, are distinct actionable wrongs. The former is complete without the existence of an intent not to pay for the property, and the latter is complete though there be no false representations to induce the sale. In case of the latter wrong, false representations and undisclosed insolvency are not necessary elements, but are evidentiary facts tending to establish the intent not to pay, though the latter of itself is not sufficient to establish such fact.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

Plaintiff sold a quantity of merchandise on credit to one Cassius B. Nelson, a merchant. After the property had been added to Nelson's stock in his store and some portion of it sold, the entire stock was seized by the defendant, as sheriff, on an execution issued on a judgment against Nelson. Plaintiffs thereupon rescinded the sale upon the ground that they were induced to make it by Nelson's false representations. This action was then commenced to recover that portion of the property which could be identified in the hands of the sheriff, and an action was brought against Nelson for damages, there being some property that could not be found.

The complaint in this action was in the usual form in a replevin action. Proceedings to obtain immediate possession of the subject of the action were taken and the object of such proceedings accomplished. Defendant moved the court to quash the proceedings for the provisional remedy and to dismiss the action, because the person who made the affidavit was not one of the plaintiffs, and it did not state that such person was authorized so to do, or the means or source of his information, or that the property was within the jurisdiction of the court; and further, because the affidavit did not contain a description of the property, and the requisition to the officer to take the property from the defendant and deliver the same to the plaintiffs was indorsed on the back of a wrapper attached to, instead of on, the affidavit,

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and the officer to whom the papers were delivered did not indorse his approval of the bond at the time of or before the date of service. The court denied the motion, holding the papers substantially perfect except for the failure to state why the affidavit was not made by one of the plaintiffs and that the person making it was authorized so to do, and the source of his knowledge, which defects were held curable by amendment. Leave to make the necessary amendment to accord with the court's ruling was granted. Both parties filed exceptions to such ruling. Plaintiffs did not amend the affidavit.

Defendant answered, putting in issue the allegations of the complaint, justifying under the execution against Nelson, under which the property was seized as before stated, and pleading in abatement the same defects in the papers used to obtain possession of the property which were urged on the motion before referred to. The plea in abatement was held bad on demurrer.

On the trial a judgment rendered in the action against Nelson for damages, and the record in such action, were offered in evidence, and on objection by the defendant were rejected. The trial resulted in a verdict and judgment for defendant, from which plaintiffs appealed.

For the appellants there were briefs by *Tenney, Hall & Tenney*, and oral argument by *F. W. Hall*.

For the respondent there was a brief by *Bashford, Aylward & Spensley*, and oral argument by *R. M. Bashford*.

MARSHALL, J. Respondent's attorneys urge that appellants have no standing in this court because the lower court failed to obtain jurisdiction of the subject matter of the action for want of a proper affidavit in the proceedings to obtain possession of the property in advance of a settlement of the controversy between the parties, and because of some other defects claimed in such proceedings. The learned

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counsel for respondent rely on the rule that prevailed in the action of replevin at common law, which could be commenced only by the issuance of a writ of replevin. The writ being essential to the commencement of the action, everything necessary to the issuance thereof was deemed jurisdictional. Such is now the case in actions in justice's court for the recovery of personal property and actions there commenced by writ of attachment. But it hardly admits of serious discussion, at this late date, but that such an action in the circuit court, commenced by the service of a summons like any other action, and proceedings to obtain possession of the subject of the controversy in advance of the judgment, are sufficiently independent of each other that the latter may be omitted entirely at the election of the plaintiff. The statute on the subject is so plain, and the long-settled practice so well understood by the profession, that we hardly feel justified in going much further on this branch of the case than to refer to such statute. Sec. 2717, Stats. 1898, provides that "the plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons or at any time before answer, claim the immediate delivery of such property." It will be noted that the very language of the section indicates unmistakably that the action may be commenced and immediate possession of the property not be claimed at all. The section that follows governs the proceedings under the quoted section and requires substantially the same affidavit as was formerly required to secure a writ of replevin. The mere indorsement upon, in connection with, the affidavit, requiring the sheriff to take the property from the defendant and deliver the same to the plaintiff serves all the purposes of a writ not covered by the summons and the service of it. The distinction between the old action of replevin and the action under the Code has been many times pointed out by this court. *Dudley v. Ross*, 27 Wis. 679; *Bigelow v. Doolittle*, 36

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Wis. 115; *Brewster v. Carmichael*, 39 Wis. 456. Where the property in a replevin action is taken and afterwards returned to the defendant and retained by him, or where it is not taken at all and is not recovered by the judgment, the action results substantially the same as an action of trover.

The judgment in this action against Nelson was properly rejected because the defendant was not in privity with him for two reasons: first, because the defendant's interest in the property, if he obtained any at all under the execution, was acquired before the commencement of the action against Nelson; and second, because the property involved in this action is not the property involved in that action.

It is unquestionably the law that a judgment of a court of competent jurisdiction is binding between the parties to the particular action litigated regarding the subject thereof, either as a plea in bar or evidence in estoppel, not only as to every question actually presented and considered, and upon which the court rested its decision, but every point within the issues that might have been presented and decided in the cause, and is likewise conclusive in any subsequent action between the same parties upon a different subject matter, as to every question actually litigated and decided in the former action. *Wentworth v. Racine Co.* 99 Wis. 26; *Cromwell v. Sac Co.* 94 U. S. 351; *Davis v. Brown*, 94 U. S. 423; *Campbell v. Rankin*, 99 U. S. 261; *Nesbit v. Riverside Independent Dist.* 144 U. S. 610. It is further the law that a judgment is as binding on privies as on parties, as to questions actually decided and upon which the judgment rests, whether it be rendered on insufficient evidence, or false evidence, or erroneous notions of the law. So long as the judgment stands it may be invoked in the court where rendered, and in all courts, between the parties to the action and their privies, as the infallible truth. Cooley, Const. Lim. 62; *Case v. Hoffman*, 100 Wis. 336.

Though the doctrine stated in the foregoing is firmly es-



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tablished and found in general terms in all text-books and many adjudications, its application is not always free from difficulty, as evidenced by the position of counsel in this case. It is not questioned but that if Nelson were a party to this action the judgment in the action for damages would be conclusive against him, but it does not follow that the defendant has no better right than Nelson. The doctrine of *res adjudicata* does not go that far unless the respondent is in privity with Nelson. It is assumed by appellants that the essential of privity exists, because the right upon which respondent relies is dependent upon the right of Nelson. The difficulty is that the right of property here involved is not that involved in the former litigation. Privies, whether in blood, or in law, or in estate, occupy that relation to others because of derivative rights of property. Privity relates to persons in their relation to property and not to any question independent of property. In the doctrine of *res adjudicata*, privity extends no further than the particular subject matter or property, the status of which was determined by the judgment as to that particular thing. A person subsequently dealing with it, dependent for his right to do so upon a title acquired of one of the parties to the litigation after that title was impressed by the result of such litigation, in a controversy with the adverse party or a person claiming under him, is concluded by the judgment. Such judgment, in that situation, fixes the status of the property beyond question, whether it was right or wrong. The mere personal effect of the judgment, however, is absolutely confined to the parties to the litigation. It does not attach to and become a rule of property as to any other thing than the particular subject of the controversy which was closed by the judgment. Failing to keep distinctly in mind that privity relates to property only in the doctrine of *res adjudicata*, and to the particular property forming the subject of the former litigation, often leads courts and practitioners

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into confusion and error. The term is applicable only to the situation of mutual succession or relation to the same right of property. Herman, Estoppel, § 139; *McDonald v. Gregory*, 41 Iowa, 513; *New Orleans v. Citizens' Bank*, 167 U. S. 371.

We have had occasion heretofore to refer to the inaccurate manner in which the doctrine of *res adjudicata* is often stated, regarding the binding force of a judgment upon parties to the litigation. *Wentworth v. Racine Co.* 99 Wis. 26. We may here say, properly, there is quite as much absence of precision in the language ordinarily used in stating the effect of the judgment upon privies as upon the parties to the litigation. The mere statement that a judgment is binding on parties and privies, is vague to many minds in that, in its literal sense, it is not confined as to privies to the particular subject of the litigation in which the judgment was rendered. The difficulty in that regard would be avoided if the rule were always so stated as to confine the conclusiveness of a judgment as to privies to the particular property, property right, or thing in controversy in the action.

It is clear from the foregoing that the decision of the trial court rejecting the evidence of the result of the proceedings against Nelson was proper. While defendant claims under Nelson, he is not a successor to the same property involved in the former litigation. The judgment in the first suit as to the parties thereto and persons claiming under them, was stamped upon, and became a rule of property of, the particular thing involved in that suit. There is no privity here, as to a thing involved in the former litigation, because the subject of this action was, as to Nelson, affected by the same question as that formerly decided.

There was evidence from which a jury might have found in plaintiffs' favor, either or both of two distinct wrongs: first, that the goods were obtained by false representations as to the financial ability of Nelson; second, that Nelson

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obtained the goods with intent not to pay for them. The court was requested to instruct the jury in substance that either of such wrongs was sufficient to entitle plaintiffs to rescind the sale and recover back the subject thereof, which request was refused. The jury were then instructed, in effect, that though the goods were obtained of plaintiffs by false representations, plaintiffs could not recover if Nelson, notwithstanding such false representations, intended in good faith to pay for the property; that is to say, that to obtain property by purchase induced by representations however false, is not actionable fraud, whatever may be the actual result to the seller, in the absence of intent not to pay therefor.

The refusal to instruct the jury as requested, and the instruction given as stated, constitute the errors upon which appellants' counsel chiefly rely for a reversal. The first impression made by the proposition that a person may obtain property by purchase from another by means of false representations, and retain it against the will of the vendor if such person intended to pay according to his contract, was that it was hardly worthy of serious consideration. Certainly, if such be the law, our system is sadly imperfect. Respondent's counsel cite numerous cases to sustain the ruling of the trial court, which we have carefully examined with the result that in our opinion none of them favors such ruling, but all are against it. It is needless to review the cases at any great length. A few may be taken as a type of all. In *Burrill v. Stevens*, 73 Me. 395, the sole question was, If one purchases property upon credit, with a positive intention, entertained and acted upon at the time, of never paying for the property, is it such a fraud as will entitle the seller to avoid the sale in the absence of any fraudulent representations or false pretenses characterizing the transaction? It will be seen by reading the opinion that it was assumed that a sale induced by false representations on the part of

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the vendee could be rescinded. That was a question not in the case. There were no false representations, but there was a distinct intent, entertained by the buyer at the time he made the purchase, never to pay for the property obtained. So the judicial inquiry was whether that alone constituted adequate ground for a rescission of the sale and recovery back of the property.

In *Thompson v. Peck*, 115 Ind. 512, there was a mere omission on the part of the vendee to disclose to his vendor his insolvency at the time of making the purchase. The question of whether that was sufficient ground for a rescission of the sale in the absence of any intent not to pay, was decided in the negative in accordance with numerous authorities on the subject and the rule distinctly laid down by this court. *David Adler & Sons C. Co. v. Thorp*, 102 Wis. 70; *Consolidated M. Co. v. Fogo, ante*, p. 92. The language of Judge MITCHELL, in the Indiana case, to the effect that, in order that goods may be reclaimed when obtained on a sale in the regular course of business, there must be some artifice, or false pretense, or fraudulent suppression of the truth, which enables the purchaser to obtain possession of the goods, and it must appear that he intended at the time of making the purchase not to pay for them, must be read with reference to the particular question then under consideration,— whether mere neglect of the vendee to disclose his insolvency will warrant a rescission of the sale. To that the court gave a negative answer, saying, in effect, that it would require a specific intent not to pay, and that the failure to disclose the condition of the insolvency, there being no inquiries on the subject and no false representations made, was not sufficient to warrant a rescission. True, the language of Judge MITCHELL is somewhat liable to mislead, if one does not have in mind the settled law on the subject and take into consideration the question before the court. Similar misleading language was used by the judge who

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wrote the opinion in *Taylor v. Mississippi Mills*, 47 Ark. 247, but in a later case, *Bugg v. Wertheimer-Schwartz S. Co.* 64 Ark. 12, the court took occasion to state that such language was inaccurate unless read in connection with the facts of the case and the question under consideration, such question being, Is a preconceived intent not to pay sufficient to warrant the rescission of a sale? In *Morse v. Dearborn*, 109 Mass. 593, the question was, If a person falsely represent to another his financial condition for the purpose of obtaining a line of credit with such other, and subsequently buy goods of such other upon credit so established, the vendor relying upon such false representations, can the vendor, on discovering the truth, reclaim the subject of the sale?

A review of the rest of the long list of cases cited by appellants' counsel would only be a continuation of the showing thus made. The idea that a sale induced by false representations is not voidable in the absence of an intent on the part of the purchaser not to pay, comes from confusing statements made in judicial opinions to the effect that a mere failure by the vendee to disclose his insolvency, unaccompanied by any false pretenses or artifice, is not sufficient to warrant a rescission of the sale,— that there must be in addition an intent not to pay, with the substantive wrong of obtaining goods by false pretenses. In many of the cases found in the books, where there were no false representations and the ground upon which the recovery was sought was intent not to pay, language is used to the effect that mere insolvency and failure to disclose it is not sufficient of itself to establish the essential element of intent not to pay,— that there must be, in addition, false representations of some kind, or some artifice resorted to in order to obtain possession of the goods. There is no question anywhere in the books but that a sale induced by false pretenses alone is voidable, or but that a purchase with preconceived intent

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not to pay is also voidable; but the circumstances, from which the intent mentioned may be inferred, are the subject of much discussion, in which, as before indicated, it will be found stated, over and over again, that false representations of some kind are necessary if the only other evidentiary fact is insolvency of the buyer. Such statements of the law led counsel for the respondent, evidently, and the trial court as well, to the erroneous conclusion that a formed intent not to pay, and false pretenses as well, are essential elements to a complete wrong warranting a rescission of a sale. Mere evidentiary circumstances, so treated in the law, the trial court held were essential elements of an actionable wrong.

Our own decisions are replete with precedents where false representations of material facts, made to induce a sale, relied upon by the seller, were held sufficient to render the sale voidable at the election of the seller, and that, whether the purchaser knew or did not know the representations made by him were false, it being held sufficient if he either knew or ought to have known the truth of his statements before making them. *McKinnon v. Vollmar*, 75 Wis. 82; *Montreal River L. Co. v. Mihills*, 80 Wis. 540; *Porter v. Beattie*, 88 Wis. 22; *Gunther v. Ullrich*, 82 Wis. 222; *Beetle v. Anderson*, 98 Wis. 5; *Friend Bros. C. Co. v. Hulbert*, 98 Wis. 183; *David Adler & Sons C. Co. v. Thorp*, 102 Wis. 70. That is in accordance with the doctrine found laid down in the standard text-books. Benj. Sales, § 451. The only distinction recognized anywhere, between a sale induced by fraudulent representations and a purchase with intent not to pay, as substantive, independent, actionable wrongs, is that in the former the transaction is deemed to be voidable and in the latter absolutely void. That distinction is made in some jurisdictions, but, as said by the text writers, it is of no practical importance.

Authorities may be cited without substantial conflict, and

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much beyond the limits that can be devoted it in this opinion, in support of the doctrine stated. Many of such authorities are found in the brief of the appellants. *Hodgeden v. Hubbard*, 18 Vt. 504; *Mooney v. Davis*, 75 Mich. 188; *Reid v. Cowduroy*, 79 Iowa, 169; *Newell v. Randall*, 32 Minn. 171; *Stephenson v. Weathersby* (Ark.), 45 S. W. Rep. 987; *Bugg v. Wertheimer-Schwartz S. Co.* 64 Ark. 12; *Burnham v. Ellmore*, 66 Mo. App. 617; *Burnham v. Jacobs*, 66 Mo. App. 628; *McKenzie v. Weineman*, 116 Ala. 194; *Jandt v. Potthast*, 102 Iowa, 223; *Mauger v. Slavin*, 11 App. Div. 483; *Woonsocket R. Co. v. Loewenberg Bros.* 17 Wash. 29; *Stevenson v. Marble*, 84 Fed. Rep. 23; *Huthmacher v. Lowman's Sons*, 66 Ill. App. 448.

In *Bugg v. Wertheimer-Schwartz Co.* 64 Ark. 12, cited by appellants' counsel and before referred to, the precise proposition here contended for by respondent's counsel was urged upon the attention of the court and was repudiated as contrary to the settled law, many authorities being cited on the subject, including *Judd v. Weber*, 55 Conn. 267, where it was said that 'when goods are obtained by false representations as to the financial standing of the purchaser, an intent of the buyer to pay may lessen the moral turpitude of the act, but it does not suffice to antidote and neutralize the intentional false statement which has accomplished its object of benefiting the purchaser and misleading the seller to his injury.'

From the foregoing the following principles may be stated as established: If a person misrepresent to another material facts, knowing, or under such circumstances that he ought to know, the truth, for the purpose of inducing such other to sell property to him, and such other, without negligence, relying upon such representations, make the sale, he can, upon discovering the truth, rescind the transaction and recover back his property, saving the rights of *bona fide* purchasers or incumbrancers thereof in the mean time. To

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obtain property by false representations in the manner indicated, constitutes a substantive, actionable wrong, without regard to whether the vendee does or does not intend to pay for the subject of the purchase. If a person purchases property of another with intent not to pay for the same, the vendee may rescind the sale and recover back the subject thereof, as in case of the circumstances first stated. False representations to obtain the property are not a necessary element to make a complete cause of action under the circumstances covered by the second proposition, nor is intent not to pay essential to a complete cause of action under the circumstances covered by the first proposition. The former is complete by the concurrence of false representations of material facts, regarding which the falsifier knows or ought to know the truth, for the purpose of inducing a sale of property to him, and the consummated contract of sale, the seller relying upon such false representations. In such circumstances the law will not permit the wrongdoer to profit by his fraud if the wronged party otherwise elect, saving the rights of innocent third persons. The latter is complete by the purchase of property, the transaction being characterized by a secret, definitely formed intent on the part of the purchaser never to pay for the subject of the purchase. While false representations to obtain possession of the property, and insolvency of the purchaser, are evidence bearing on the existence of the fraudulent intent, neither of such elements is essential to a cause of action to recover back the property. They are evidentiary facts tending to show the fraudulent purpose not to pay. That is all. The two circumstances together, or that of false representations made to obtain possession of the property alone, may warrant a finding of the fraudulent intent mentioned, but the mere fact of undisclosed insolvency, of itself, is not sufficient. *David Adler & Sons C. Co. v. Thorp*, 102 Wis. 70. Such stated principles are fatal to the judgment appealed

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from. The trial court was clearly wrong as to the law applicable to the evidence in the case.

*By the Court.*— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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HARRINGTON, Respondent, vs. PRIEST, Appellant.

*September 29 — October 20, 1899.*

*Instructions to jury: Burden of proof.*

In an action to recover for dental services, in which the answer alleged that the services were so unskilfully and negligently performed as to be worthless, and also set up a counterclaim for damages by reason of such unskilful work, the trial court, in charging the jury as to the burden of proof on the question whether the work was or was not skilfully done, made inconsistent statements which failed properly to distinguish between the two issues presented and must have confused the jury. *Held*, a material error.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

The plaintiff brought this action to recover for dental services rendered to the defendant, alleged to have been of the reasonable value of $250. The defendant answered that such services were so improperly, unskilfully, and negligently performed as to be worthless, and in his counterclaim alleged that by reason of such negligent and unskilful work he was damaged in the amount of $1,000. The jury returned a verdict for the plaintiff for $228.30. A motion for a new trial was denied, and from the judgment entered upon the verdict the defendant appeals.

For the appellant there was a brief by *G. H. Dawson* and *Humphrey Pierce*, and oral argument by *Mr. Pierce.*

*A. A. Nugent*, for the respondent.

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BARDEEN, J. The complaint alleges that the plaintiff performed certain dental services for the defendant, which were reasonably worth $250. The answer denies that such services were worth that amount, and alleges that they were so negligently and unskilfully performed as to be entirely worthless. Here was presented a plain and simple issue. The burden of proving that the services rendered were performed with reasonable skill, and were worth the sum mentioned, was upon the plaintiff. Upon this point the court charged the jury as follows: "The burden of proof, so far as this case is concerned, rests upon the plaintiff to establish his side by a fair preponderance of the evidence, which is sometimes called the down weight of the evidence. If you find from the testimony, as I say, that the plaintiff did this work in a reasonably careful and skilful manner,—in such manner as dentists of ordinary standing or good standing in this community or this vicinity would have done it,—and that the price he has charged is a reasonable price, then you should return a verdict in favor of the plaintiff for the full amount claimed." This was a proper charge under the issues so far presented. But the defendant set up a counterclaim in which he alleged that he had been damaged in the sum of $1,000 by reason of plaintiff's unskilful and negligent work. The defendant thus assumed an aggressive attitude, and presented an affirmative issue. In order to recover upon his counterclaim, the burden was clearly upon him to show that he had been damaged by reason of the plaintiff's negligent and unskilful work. The trial court, however, seems to have failed to grasp the situation. Immediately following the charge quoted, he makes the following statement to the jury: "If, on the other hand, you find from the evidence, and there the burden of proof rests upon the defendant in establishing the fact that the work was improperly done, it is necessary for the defendant to satisfy you of that by a fair preponder-

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ance of the evidence; as I say, on that branch of the case the burden of proof rests upon the defendant. So that if you are satisfied from the evidence, by a fair preponderance of the evidence, that the plaintiff did the work in an unskilful and negligent manner, and did it in such a way as it would not have been done by a dental practitioner in good standing in this vicinity, and the work was not as good as it should have been under that rule, then it will be your duty to determine the amount of difference caused by such unskilfulness and negligence or want of care."

This must have left the jury in the utmost confusion. In the one place he tells them, in effect, that the burden is upon the plaintiff to show that he performed the services sued for in a reasonably skilful and careful manner, and that they were reasonably worth the sum charged therefor. These matters were directly put in issue by the defensive allegations of the answer. Confessedly, the plaintiff had the laboring oar, and, if the evidence of the defendant was of equal weight with that of plaintiff, the latter could not recover. There was no burden upon defendant to show affirmatively that such services were negligently or unskilfully performed, or that they were not worth the sum claimed. If his evidence in defense left the issue in doubt or uncertainty, the plaintiff could not recover. But in the next breath the court tells the jury that the burden rests upon the defendant "in establishing the fact that the work was improperly done." Under the circumstances this certainly could not be true. The inconsistency of the two statements is too apparent to require argument. When it came to the question of *damages* under the counterclaim, the defendant could not secure a recovery except that he established a claim therefor by the preponderance of the evidence. The court failed to properly distinguish between the two issues presented, and the jury were left to wander in the realms of doubt and speculation. This was distinct error,

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for which the judgment must be reversed. The errors alleged as to the improper admission of testimony are too unsubstantial to require comment.

*By the Court.*— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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WOODWARD, Respondent, vs. SMITH, Appellant.

104 365
s109 609

*September 29 — October 20, 1899.*

*Nonnegotiable instrument: Failure of consideration: Evidence.*

In an action upon an order for the payment of money out of a specified fund, brought by an indorsee who had notice that its consideration was the performance of a certain contract and that nonperformance was claimed, it was error to exclude evidence offered to prove such failure of consideration.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Plaintiff sued upon an order in the following words:

"Mission, Outagamie Co., Wis. June 1, 1897.

"*Buckstaff-Edwards Co.:*

"Please pay to the order of G. E. Woodward and Ed. Erickson the sum of $600, the same to be the last $600 due me on my contract, and charge the same to my account.

"JOSEPH SMITH"

which order was indorsed to him in blank by G. E. Woodward and Ed. Erickson. It appeared that at the time of the giving of said order, to the knowledge of the plaintiff, defendant was prosecuting a logging and lumbering contract for the Buckstaff-Edwards Company.

After the introduction of the order in evidence, defendant made several offers to prove, in accordance with the allegations of his answer, that the consideration of the order was the performance of a contract by Woodward & Erickson to drill a well for him, the same to be drilled until running

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water was procured or until he directed cessation; that the contract had been breached; and that the plaintiff had full knowledge of the consideration and of the breach, and at the time of the giving of the order undertook to see that the contract was carried out. These offers of evidence were rejected by the court, who stated in the course of the trial: "My view is that the defendant can only defend against this order by showing damages that have accrued to him by reason of the plaintiff's failure to carry out the promise which he then made."

A verdict was directed for the plaintiff, and judgment entered thereon for the amount of the order and interest, from which defendant appeals.

For the appellant there was a brief by *Kerwin, Phillips, Hicks & Cleveland*, and oral argument by *C. D. Cleveland, Jr.*

For the respondent there was a brief by *Wigman & Martin*, and oral argument by *J. H. M. Wigman.*

DODGE, J. The law governing the situation presented is elementary. The order in question is not negotiable, being payable out of a specified fund. *Brill v. Hoile*, 53 Wis. 537; *Bank of Iron River v. School Directors of Iron River*, 91 Wis. 597. Further, the plaintiff had notice of the defenses set up. For both these reasons, he took it subject to all defenses available against the original payees. Failure of consideration in nonperformance of their contract by Woodward & Erickson would be a good defense. Randolph, Commercial Paper, § 556; *Folger v. Dousman*, 37 Wis. 619; *Ward v. Perrigo*, 33 Wis. 143. The evidence offered and rejected would have tended to prove such failure of consideration, and should have been received. Its rejection excluded defendant from a legitimate defense pleaded in his answer, and was error.

*By the Court.*— Judgment reversed, and cause remanded for a new trial.

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# CONRAD, Respondent, vs. THE TOWN OF ELLINGTON, Appellant.

104 367
105 243
105 410
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*September 30 — October 20, 1899.*

*Highways: Injuries from defects: Damages limited to amount named in claim: Evidence: Court and jury: Instructions: Proximate cause: Contributory negligence: Burden of proof.*

1. Under sec. 824, Stats. 1898 (providing that "no action upon any claim or cause of action for which a money judgment only is demandable . . . shall be maintained against any town unless a statement or bill of such claim shall have been filed with the town clerk to be laid before the town board of audit"), the damages recoverable in an action against a town for personal injuries are limited to the amount named in the claim filed.
2. In an action to recover for injuries alleged to have been caused by defects in a corduroy road, evidence of a medical expert that such an accident as plaintiff claimed to have suffered *might* produce such an injury as that received by him, and that plaintiff's injuries incapacitated him to the extent of about two thirds, although somewhat conjectural, is *held* not to constitute material error.
3. It was not error in such a case to permit proof of the generally bad condition of the corduroy road at and in the vicinity of the place in question two days before the accident. *Olson v. Luck*, 103 Wis. 33, distinguished.
4. In an action to recover for personal injuries, remarks of the trial judge to the effect that he did not think there was any negligence in the conduct of plaintiff up to the time the doctor was called in, that the doctor got to his home at about the same time he did, and that negligence could not be predicated on that as a matter of law,—such remarks referring merely to the matter of promptly calling a physician, and there being no dispute as to that fact,—are *held* not error.
5. In an action for injuries alleged to have been caused by a defect in a highway, defendant claimed that such defect was caused by a sudden and heavy rainfall the night before the accident. One of the questions in the special verdict was, "Was such defective condition of the highway the proximate cause of the plaintiff's injury?" In submitting this question the court instructed the jury as to the meaning of "proximate cause," but did not specifically require them to find whether the condition of the highway prior

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to said rainfall was the proximate cause of the injury. *Held*, not misleading, in view of other full instructions on that subject.

6. The burden of showing contributory negligence in such a case is upon the defendant, except when such negligence is disclosed by the testimony on the part of the plaintiff.

7. The question of plaintiff's contributory negligence is *held* to have been properly submitted to the jury, notwithstanding the sudden and heavy rainfall the night before the accident.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed in part; reversed in part.*

*John Bottensek*, attorney, and *Humphrey Pierce*, of counsel, for the appellant.

For the respondent there was a brief by *Roemer & Spencer*, and oral argument by *A. M. Spencer*.

CASSODAY, C. J. This action was commenced August 26, 1897, to recover damages for personal injuries sustained by the plaintiff June 21, 1896, about noon, by reason of an alleged defective highway, consisting of a hole or depression in the traveled portion thereof at the place described. Issue being joined and trial had, at the close thereof the jury returned a special verdict to the effect: (1) that the plaintiff was injured by being thrown from a wagon at the time and place described; (2) that the highway at that place was in a defective condition for travel upon and over the same; (3) that said highway, on the evening before, was not in a reasonably safe condition for the travel passing over it; (4) that such defective condition of said highway at the time and place named was not caused by an unusual or extraordinary rainfall occurring during the night before the accident; (5) that the defendant did not have actual notice of such defect in time to have the same repaired before the accident; (6) but that such defect had existed for such a length of time before the accident that the defendant, in the exercise of ordinary care and diligence, would have known of such de-

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fect and repaired the same; (7) that such defective condition of the highway was the proximate cause of the plaintiff's injuries; (8) that there was no want of ordinary care on the part of the plaintiff at the time of the accident which contributed to the injuries he received; (9) that the plaintiff sustained damages to the amount of $2,600. From the judgment entered thereon in favor of the plaintiff for that amount the defendant brings this appeal.

1. The plaintiff was injured June 21, 1896. On July 25, 1896, the plaintiff presented his claim against the town, and filed the same with the clerk, wherein he claimed that the defendant was liable in damages to him in the sum of $1,000, and the original complaint only demanded judgment for that amount. Afterwards, and on November 28, 1898, at the beginning of the second trial, the plaintiff was allowed, against objection, to amend his complaint, and increase his prayer for judgment to $5,000; and, as indicated, the jury assessed his damages at $2,600, and judgment was entered for that amount. With certain exceptions, the statute declares that "No action upon any claim or cause of action for which a money judgment only is demandable . . . shall be maintained against any town unless a statement or bill of such claim shall have been filed with the town clerk to be laid before the town board of audit." Sec. 824, Stats. 1898. The filing of such statement or bill of such claim was essential to the maintenance of the action, and a failure to allege the same in the complaint would have been fatal on demurrer. *Benware v. Pine Valley*, 53 Wis. 527; *Eron v. Stevens Point*, 85 Wis. 379; *McKibben v. Amory*, 89 Wis. 607; *Flieth v. Wausau*, 93 Wis. 446. The "statement or bill" so required to be filed to be laid before the town board of audit necessarily included the amount of such claim. No such statement or bill was ever filed as to any claim in excess of $1,000. To allow the original complaint, fifteen months after its service, to be thus amended by increasing



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the claim for damages, as stated, was, in our judgment, unauthorized. The court's attention was again called to the subject by an instruction requested to limit the damages to the amount named in the claim filed. In support of the ruling of the trial court, counsel rely upon *Reed v. New York*, 97 N. Y. 620, where it was held that an estimate of the damages was not an essential part of the claim, and hence the complaint might be amended by increasing the amount of such claim. But it was under a statute declaring that "No action shall be maintained against the mayor," etc., "unless the claim on which the action is brought has been presented to the comptroller and he has neglected for thirty days after such presentment to pay the same." The difference between the two statutes is radical, and the case is not an authority to be followed under our statute quoted.

2. Error is assigned because one of the plaintiff's medical experts was allowed to testify to the effect that a man riding along over a corduroy road on a wagon with four wheels, and pitched out over the wheel into a hole, striking his shoulder onto the logs, *might* produce such an injury as that received by the plaintiff; that the injuries received by the plaintiff incapacitated him to the extent of about two thirds,—that is to say, he was only capable of performing one third as much manual labor as before the accident. True, such evidence was somewhat conjectural, but its only bearing was upon the question of damages, and, in view of what has already been said, we must hold that it is an error which does not affect any substantial right of the defendant, and therefore is not reversible error. Sec. 2829, Stats. 1898.

3. Error is assigned because one of the witnesses for the plaintiff, after having testified without objection that the plaintiff had, two weeks before the trial, pointed out to him the place where he claimed he got hurt, and that he passed over the road two days prior to the accident in question, and that he then noticed something unusual in that road

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within four or five rods of the place where the plaintiff got hurt, was allowed to testify to the effect that he observed only one bad place within four or five rods from the place where the plaintiff said he got hurt,— either way; that he was glad to get through, and did not calculate to go back, and never looked back; that his horse sank down; that he called "Whoa;" that the horse then crawled out; that the front wheels got in there, and he and his wife fell to the dashboard, and then immediately went over back. The only objection made to such testimony is that the witness did not definitely fix the spot where it occurred; that the place where it occurred was left, by the witness, too indefinite. We cannot hold that it was error to prove the general bad condition at and in the vicinity of the place in question of this corduroy road two days before the accident. *Shaw v. Sun Prairie*, 74 Wis. 105; *Barrett v. Hammond*, 87 Wis. 654. The case does not come within the ruling in the case of *Olson v. Luck*, 103 Wis. 33. Of course, the heavy rainfall the night before the accident made the road very much worse.

4. Error is assigned because, after one of the defendant's experts had been asked as to whether, in case of fractures of the bones of the shoulders and legs, people were not more or less crippled, the judge of the court remarked that he did not think there was any negligence in the conduct of the plaintiff up to the time the doctor was called in, that the doctor got to his home at about the same time that he did, and that he did not think any negligence could be predicated on that as a matter of law. We perceive no error in such remark in respect to a question of fact about which there was no dispute.

5. Error is assigned because the court, among other things, instructed the jury upon the seventh question submitted to the effect that most men would say that the word proximate meant whether it was the direct and immediate cause

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of the injury or not, but that it means more than that in the law; that it will be necessary for them to find that in order to answer that question "Yes," it must appear from the evidence that the injury which the plaintiff received was the natural and probable consequence of the negligence or wrongful act of the defendant, and that it ought to have been foreseen in the light of attending circumstances; that it means that the injury which the plaintiff received was the natural and probable cause of the defect existing in the highway, and that the town ought to have foreseen that such was or might be the result of the defect. While a portion of such instruction is not in strict harmony with what has so frequently been declared by this court to be the rule, yet, in view of the whole charge, we do not think it was misleading. The defendant's principal defense was that the defect in the highway was caused by the sudden and heavy rainfall the night before the accident, and hence that the defendant should be relieved from liability. *Allen v. Chippewa Falls*, 52 Wis. 430. The court had already fully instructed the jury on that subject, and we cannot believe that the jury was misled on the question of proximate cause.

6. Error is assigned because the court refused to give an instruction requested upon the subject of contributory negligence in connection with the eighth question submitted. What was contained in the instruction was fully covered by the general charge, unless it was the portion which states that the plaintiff must show himself without negligence. That would have been equivalent to saying that the plaintiff had the burden of proving that he was free from contributory negligence. This court has frequently held that the burden of proving contributory negligence is ordinarily upon the defendant. An exception to such rule is when such contributory negligence is disclosed by the testimony on the part of the plaintiff. *Hoye v. C. & N. W. R. Co.* 67 Wis. 15,

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and cases there cited; *Thoresen v. La Crosse City R. Co.* 94 Wis. 133. There was no error in refusing such instruction. The trial court was clearly justified in submitting the question of contributory negligence to the jury, notwithstanding the sudden and heavy rainfall. *Jung v. Stevens Point*, 74 Wis. 547; *Wiltse v. Tilden*, 77 Wis. 152.

We find no error in the record, except as to the amount of damages allowed in excess of the amount named in the claim filed.

*By the Court.*—So much of the judgment as is based upon a verdict in excess of $1,000 is reversed, with costs and disbursements, except that the defendant is not to be allowed for printing more than twenty-five pages; and the judgment in all other respects is affirmed.

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117 119

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant, vs. LANGLADE COUNTY and another, Respondents.

*September 30—October 20, 1899.*

*Injunction: Restraining tax sale* pendente lite: *Discretion.*

If, in an action to restrain the sale of lands for taxes alleged to be void, all the equities of the complaint are denied under oath, a refusal to restrain the sale *pendente lite* is not an abuse of discretion, where there will be ample time to bring the controversy to a final conclusion before plaintiff's title can be disturbed or injuriously clouded by a tax deed, and the filing of a *lis pendens* will fully protect his rights.

APPEAL from an order of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action to restrain the sale of lands for taxes alleged to be void for various reasons, some of which go to the groundwork of the tax. Upon a duly verified complaint a temporary injunction was obtained preventing a sale of the lands

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for the taxes complained of, pending a settlement of the controversy between the parties. Defendants answered under oath, putting in issue all the material allegations of the complaint, and denying generally or specifically all of the equities therein stated or claimed. On such answer and supporting affidavits, and on motion of defendants' attorney, the temporary injunction was dissolved. Plaintiff appeals.

For the appellant there was a brief by *Geo. W. Latta*, attorney, and *Fish, Cary, Upham & Black*, of counsel, and oral argument by *Mr. Latta.*

*T. W. Hogan*, for the respondents.

MARSHALL, J. The merits of this case are not involved on this appeal, and will not, therefore, be discussed or determined in any way. The learned counsel for the appellant discourses in his brief very earnestly and forcibly against the wrongs which he insists are being inflicted upon non-resident landowners in that section of the state where the lands described in the complaint are located. If his contentions are in accordance with the truth, the situation is to be deeply deplored and promptly remedied when the facts are established and the time shall have arrived for the law to be judicially declared. But we have here the simple question to deal with of whether the lower court abused its judicial discretion in refusing to restrain the sale of plaintiff's lands pending the determination of the controversy in respect to the validity of the taxes.

Injunctions *in limine* are granted for the purpose of preserving the *status quo* when that seems reasonably necessary in order that the final judgment may be effective to remedy the wrongs complained of. It is only where it is clear that temporary relief for the purpose indicated is essential, if all the equities of the complaint are denied under oath, that judicial discretion is liable to be abused by not granting it

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on such terms as will adequately protect the defendant from serious injury or inconvenience if the court shall finally decide that the plaintiff is not entitled to the relief demanded in the complaint. *Valley I. W. Mfg. Co. v. Goodrick*, 103 Wis. 436.

The foregoing statement of the rule governing the situation presented to the trial court sufficiently shows that the order appealed from must be affirmed. As said by respondents' counsel, there will be ample time to bring the controversy between the parties to this cause to a final conclusion before plaintiff's title can be disturbed or injuriously clouded by a tax deed. The mere filing of a *lis pendens* will unquestionably bind all persons, claiming under any tax sale that may be made, by the judgment that may be entered in the action, and perfectly protect plaintiff from serious injury.

*By the Court.*— The order appealed from is affirmed.

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FINDLAY and another, Respondents, vs. KNICKERBOCKER ICE COMPANY, Appellant.

104 875
114 18

*October 2 — October 20, 1899.*

*Amendment of pleading: Replevin: Measure of damages: Depreciation in value: Punitory damages: Property not* in esse: *Verdict: Immaterial errors.*

1. An oral decision allowing an amendment of the complaint is sufficient, and the court's declaration of what the decision was, reduced to writing and signed ten days later *nunc pro tunc*, will not be disregarded on appeal, at least upon the conflicting recollection of counsel.
2. For a tortious taking of personal property amounting to a conversion, the owner, when he cannot obtain his property, may recover in replevin its value *at the time of the taking*, and interest from that time.

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3. Where in such a case the owner recovers either the possession of the property or its value as of a later date than the tortious taking, he may recover in addition, as damages, any depreciation in the value of the property which has taken place from any cause pending the detention, even though such depreciation was not due to defendant's fault or neglect.
4. An ice-house, in which plaintiffs had stored ice pursuant to a renting partly oral and partly by letter, was purchased by defendant, who also received a bill of sale, in general terms, of personal property. Plaintiffs were about to remove the ice, but defendant, being in doubt as to whether it had been transferred by the bill of sale or was the property of the vendor of the ice-house, demanded evidence of plaintiffs' title. Plaintiffs refused to furnish such evidence, although they might easily have done so, and defendant thereupon refused to permit them to remove the ice unless they exhibited a lease. No wrong motive, malice, or wantonness in the withholding of the ice being shown, plaintiffs were not entitled, in replevin, to recover punitory damages.
5. In replevin for a quantity of ice it appeared that the ice had dwindled from 1,800 tons at the time of the seizure by defendant to forty tons at the time of the trial, and had become a conglomerate mass not worth the cost of removal. *Held*, that the property in controversy had become practically nonexistent, and that an insufficient description thereof in the verdict and the failure to find the value per ton so as to enable delivery of a part in diminution of the recovery were immaterial errors.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

In the spring of 1898 defendant purchased from the National Ice Company a certain ice-house and also received a bill of sale, in general terms, of personal property, the contents of which is not specifically disclosed, but according to evidence might have sufficed to transfer any ice stored in that ice-house. Plaintiffs, the winter previous, cut and stored in the ice-house, under the authority of a renting partly verbal and partly by letter, a quantity of ice, as to which transaction the defendant had no knowledge. In June, 1898, defendant, learning that the plaintiffs were about to remove the ice, applied to one of them for information as

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to their rights and demanded that he exhibit his lease, which plaintiff refused to do with the assertion, according to some of the testimony, that he had a lease at hand but was under no obligation to exhibit it. Defendant thereupon, on June 6, 1898, interrupted plaintiffs in the removal of the ice, put a custodian in charge thereof, and notified plaintiffs that they could not remove the ice unless they exhibited a lease. Plaintiffs made no attempt to convince defendant of their rights, and on June 13th commenced this action in replevin, without affidavit for possession of the property. The action was tried in January following, by which time the ice, originally approximating 1,700 or 1,800 tons, had melted away so that there only remained a pile amounting to about forty tons. The defendant, a few days before the trial, had satisfied itself, from other sources, of plaintiffs' ownership, which it conceded on the trial. Under instructions from the court, the jury by their verdict found the value of the ice, at the time of its seizure by the defendant, June 6th, at $1,275, with nominal damages for detention, and also found exemplary damages in the sum of $2,100.

Prior to the commencement of the January term of court the plaintiffs gave notice of motion to amend their complaint so as to set out grounds for special and consequential damages, and also by inserting allegations and prayer for exemplary damages. This motion was taken up at the opening of the term, on the 9th and 10th of January, and the court announced a decision, orally, denying the amendment with reference to consequential damages and permitting that with reference to exemplary. Some dispute exists as to the terms of that decision. During the trial, objection being made to any evidence or submission upon the question of exemplary damages, the court reduced to writing and signed, on January 19th, an order, as of the 9th, amending the complaint by inserting allegations that the taking was wilful, wanton, and malicious, and raising the *ad damnum* to $5,000.

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For the appellant there was a brief by *B. J. Stevens*, attorney, and *W. H. Card*, of counsel, and oral argument by *Mr. Stevens*. To the point that defendant's interference with plaintiffs' property being without malice, wilfulness, or wantonness, there was no basis for exemplary damages, they cited *Patry v. C., St. P., M. & O. R. Co.* 77 Wis. 218, 227; *Grace v. Dempsey*, 75 Wis. 313, 325; *Anderson v. Sloane*, 72 Wis. 582–584; *Barnes v. Martin*, 15 Wis. 240, 245; *Beveridge v. Welch*, 7 Wis. 465, 474; *Hamlin v. Spaulding*, 27 Wis. 360; *Potter v. C. & N. W. R. Co.* 21 Wis. 372; *Goodno v. Oshkosh*, 28 Wis. 300; *Spicer v. C. & N. W. R. Co.* 29 Wis. 580; *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388; *Robinson v. Superior R. T. R. Co.* 94 Wis. 345.

For the respondents there was a brief by *Morris & Riley* and *H. W. Chynoweth*, and oral argument by *Mr. Chynoweth*.

DODGE, J. 1. The regularity of the amendment of the complaint cannot be doubted. An oral decision amending the complaint, made by the court on the 9th or 10th of January, was entirely sufficient for that purpose (*Baker v. Baker*, 51 Wis. 538); and we cannot disregard the court's declaration of what that decision was, reduced to writing and signed ten days later *nunc pro tunc;* certainly not, upon the conflicting recollection of counsel.

2. Counsel for appellant urges as error the fact that the court submitted to the jury the question of the value of the property at the date of the seizure by defendant, viz. June 6, instead of at the time of commencing suit, June 13, 1898, or at the time of the trial, January 19, 1899. The taking by the defendant was unquestionably tortious, and constituted a conversion, if plaintiffs had chosen so to treat it. That being so, the rule of damages is too well and deliberately settled by this court in *Ingram v. Rankin*, 47 Wis. 406, to require or admit discussion. The plaintiff is entitled to recover, when he cannot obtain his property, its value *at the time of its taking*, and interest therefrom, with damages for

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detention, which need not here be mentioned. Under what circumstances it may be proper to submit the question of the value of the property at the time of the trial, if it be then *in esse* and capable of delivery in substantially its original condition, is a question not here presented; for the property in question was, for all practical purposes, nonexistent at the time of trial. It is obvious at once that the forty-ton residuum left by the melting away of the original 1,800 tons was no longer ice in merchantable form. It had, of course, lost its shape and identity as merchandise, and become a conglomerate mass, merely an incumbrance of the space it occupied, not worth the cost of removal. Delivery of the property claimed, or any part thereof, in substantially its original condition, could not be had.

While, perhaps, sufficiently disposed of for the purposes of this case by the views already expressed, we cannot forbear correction of a construction which appellant's counsel places upon the opinion in *Ingram v. Rankin* to support the rule that upon the plaintiff must fall any depreciation which the property may suffer in defendant's possession, if not due to the latter's neglect or fault. Such doctrine, though not without some apparent support elsewhere, receives none from the decisions of this court. On the contrary, the true rule, where the plaintiff recovers either possession or value fixed as of a date later than a tortious taking, is that he shall recover in addition, as damages, any depreciation in the value of the property which has taken place pending the detention from any cause. *Ingram v. Rankin*, 47 Wis. 415; *Wadleigh v. Buckingham*, 80 Wis. 230, 239; Cobbey, Replevin, § 867; *Carrel v. Early*, 4 Bibb, 270. That rule is eminently just, in that it relieves the innocent owner from the risks of depreciation or destruction, against which he is prevented from guarding by the wrongful detention by another, and requires such risks to be borne by him who illegally withholds the property. The peril should rest upon the guilty, rather than the innocent.

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The fact already stated, that it conclusively appeared that the property in controversy was not *in esse* at the time of trial, sufficiently disposes of certain detail criticisms of the verdict, in that the property is not sufficiently described to enable the sheriff to accept delivery, and that the value per ton is not ascertained, so as to enable delivery of a part in diminution of the recovery. Since no delivery is possible, such defects, if defects they be, are immaterial, and not prejudicial.

3. Appellant urges that there was no evidence to support a finding of $1,275 as the value of the ice. A careful examination of the evidence convinces us, however, that such evidence, not incredible, did exist, although it may well be that the weight of evidence preponderated in favor of a less sum. The appellant's own witness, Colby, testifies to a depth of the ice of from eleven to thirteen feet, and Aberly and Nummerdor both testify to a thickness exceeding fifteen feet. A horizontal area of about 5,000 square feet, which would result in one hundred tons of ice to each vertical foot, is established without much conflict; and, while the evidence as to value preponderates in favor of $1 per ton, there is evidence tending to establish $1.40. We therefore cannot say that there was not evidence to support the verdict on this question, although other witnesses, with perhaps better opportunity of knowledge, made lower estimates.

4. Appellant insists that there was no evidence to justify a submission of the question or to support a finding of punitory damages. The uncontradicted evidence, we think, fully establishes a state of doubt in the minds of the defendant's officers as to the ownership of this ice,—as to whether it was transferred to the defendant by a somewhat general bill of sale, or whether it was property belonging to the former owners from whom defendant had purchased the ice-house, and to whom it might have owed some duty of reasonably careful custody. In this state of doubt it was certainly justifiable to demand of an entire stranger seeking

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to remove this ice from their premises some evidence of his right thereto, and the conduct of the plaintiff, upon that request being made, in refusing to furnish any such evidence, although he might easily have done so, well tended to increase their hesitancy in surrendering to him. It also appears, without controversy, that all prohibitions against plaintiff's removal of the ice were accompanied by an offer to accept exhibition of his lease, if such he had. There is absolutely no evidence of any wrong motive, malice, or wantonness in the withholding of this property, under those circumstances, and the jury should not have been allowed to enter that almost limitless field of speculation as to motives, and punishment therefor, involved in the allowance of punitory damages. We think the submission of that question, as also the refusal of the court to set aside the verdict thereon, was error. That error, however, affects no other part of the recovery; and, while the judgment must be reversed therefor, it should be upon the condition that, if plaintiff chooses to remit the exemplary damages, the rest may stand.

*By the Court.*— Judgment reversed, and action remanded for a new trial, with the option to the plaintiff to remit the amount of exemplary damages within thirty days after the record is remitted, in which case judgment is to be entered for the plaintiff for the rest of the recovery awarded by the verdict.

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# WUNDERLICH and another, Respondents, vs. THE PALATINE FIRE INSURANCE COMPANY and others, imp., Appellants.

*October 2 — October 20, 1899.*

*Evidence: Examination of adverse party: Offer of portions: Immaterial error: Special verdict: Taking exhibits to jury room: Appeal: Sufficiency of evidence to sustain verdict: Fire insurance: Proofs of loss: Fraud: Improper remarks of counsel.*

1. The party at whose instance the examination of an adverse party was had may introduce in evidence portions of it relating to a particular subject, and the other party will then have the right to read additional portions as explanatory thereof; but the exclusion of portions of the deposition on the ground that none of it can be received unless all is offered will not warrant a reversal, where the record fails to show a sufficiently definite offer and it is not clear that the party making the offer suffered any injury from being compelled to introduce the entire deposition.
2. Where the questions submitted for special verdict cover all the material issues involved, a refusal to submit more specific questions is not error.
3. The trial court may, in its discretion, without the consent of counsel, permit the jury, while deliberating, to examine the exhibits.
4. A verdict supported only by testimony which is contrary to the great weight of the evidence and is impeached or rendered improbable by other conceded facts or is against all the reasonable inferences or probabilities in the case will not, on appeal, be permitted to stand, even though the trial court refused to set it aside. *Bank of Commerce v. Ross*, 91 Wis. 320, criticised.
5. In an action upon fire insurance policies a special verdict finding that plaintiffs had not made any false entries in their books or false statements in their proofs of loss, etc., but finding that the amount of property destroyed was much less than the amount claimed in such proofs and shown by the books, is *held* to be inconsistent and contrary to the great weight of evidence and against all reasonable probabilities in the case.
6. In a close case, repeated references by counsel in his argument to the jury to matters not in evidence, which have a tendency to influence the minds of the jury against the opposing party, may necessitate a reversal, even though the jury were directed to disregard them.

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Wunderlich and another vs. The Palatine Fire Ins. Co. and others.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is a consolidated action brought by plaintiffs upon nineteen policies of insurance, aggregating $20,500, covering certain lumber owned by them, which, it is claimed, was destroyed by fire on May 6 and 7, 1898. The defendants answered, admitting the fire and compliance with the conditions precedent as to notice and proofs of loss, and denying the value of the property destroyed. The answer also sets up, as a defense, fraud and false swearing by the plaintiffs in relation to the subject matter of the insurance, under a condition in the policy which says: "This entire policy shall be void . . . in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, whether before or after loss." It was charged that the plaintiffs were guilty of fraud and false swearing in their proofs of loss, and also in their examination under the policy, wherein they stated their loss to be 3,011,032 feet of lumber, besides some bicycle strips and shingles, well knowing that such statements were false. These false statements were alleged to have been made for the purpose of deceiving the defendants as to the amount of the actual loss by said fire, and by that means obtaining payment of a sum largely in excess of the real loss sustained.

A special verdict was returned by the jury, in which they found (1) that the lumber was wholly destroyed by fire on the night of May 6, and morning of May 7, 1898; (2) that said lumber was insured in the sum of $24,000, and that the defendants carried insurance thereon in the sum of $20,500; (3) that the plaintiffs did not make any false entries in any of their books of account relating to the insurance or the subject thereof; (4) that the plaintiffs did not swear falsely, either in their proofs of loss or in their examination under the policies, touching any matter relating to the insurance or the subject thereof; (5) not answered; (6) that the amount of lumber destroyed by fire was 2,602,544 feet, bicycle strips

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17,761, shingles 498½ thousand; (7) that the value of the material destroyed was $27,109.75.

The proofs of loss showed the aggregate amount of maple, birch, ash, pine, rock elm, soft elm, basswood, hemlock, and cedar lumber destroyed, with the price per thousand feet. The total number of feet was placed at 3,011,032, of the value of $31,691.16, including the bicycle strips, 17,761 pieces. The shingles were valued at $373.88, making the total value of the property destroyed $32,065.04.

The amount of lumber destroyed seems to have been arrived at in the following manner: The plaintiffs claimed to have made an inventory on December 29, 1897. To this they added logs cut that winter on a quarter section of land they had purchased, and logs purchased of farmers, and from the total deducted lumber sales up to the time of the fire and logs unsawed at that date. From these figures we get the following:

| | |
|---|---|
| Inventory December 29, 1897 | 1,606,739 |
| Logs from S. E. ¼ 20, 31, 12 | 1,187,720 |
| Logs purchased | 454,730 |
| | 3,249,189 |
| Lumber sales | 100,000 |
| Logs unsawed | 125,000 |

The defendants claimed that the inventory had been padded, and that no such amount of lumber was on hand; that the scale of the logs cut on plaintiffs' land had been fraudulently increased over 300,000 feet; that the amount of logs purchased from farmers had been increased 100,000 feet; and that such increase had been in the most valuable kinds of logs.

A motion to set aside the verdict was denied, and judgment was entered for the plaintiffs. The insurance companies have brought this appeal.

For the appellants there was a brief by *Mylrea & Bird*, and oral argument by *W. H. Mylrea* and *C. B. Bird*.

*T. W. Hogan* and *John Barnes*, for the respondents.

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BARDEEN, J. 1. Upon the trial the defendants offered certain portions of the plaintiffs' testimony taken upon their examination as adverse parties under the statute. This was objected to on the ground that none of it should be received unless it was all offered, which objection was sustained. Thereupon the defendants offered the whole examination in evidence under protest. One difficulty with the defendants' complaint is that the record fails to disclose what portions of the deposition they desired to offer in evidence. The prevailing rule is, as we think, that either party may read such parts of a deposition as are relevant and relate to any distinct transaction, and that the other party may introduce such other portions as relate to the same subject and tend to explain that which has been read. Jones, Ev. § 703; *Parmenter v. B., H. T. & W. R. Co.* 37 Hun, 354; *Smith v. Crocker*, 3 App. Div. 471; *Parker v. Chancellor*, 78 Tex. 526; *Watson v. Winston* (Tex. Civ. App.), 43 S. W. Rep. 852; *Dawson T. & G. Co. v. Woodhull*, 67 Fed. Rep. 451. The court was evidently wrong in holding that the entire deposition must be offered, but we should not feel justified in reversing the case on that ground, because the record fails to show a sufficiently definite offer by defendants, and it is not clear that they suffered injury from being compelled to offer the entire examination. Of course, in examinations of this kind, the plaintiff would have no right to offer the deposition so taken in the first instance; but should the defendants offer a portion relating to a given subject, the other side would have the right to read additional portions as explanatory thereof.

2. Considerable criticism is made because the court failed to include in the special verdict certain questions requested by the defendants. The verdict submitted seems to cover all the material issues in the case. The questions requested relate to specific charges of fraud in the plaintiffs' transactions, and the court might, in the exercise of a proper dis-



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cretion, have divided up the issue on that question. Questions 3 and 4, taken in connection with the charge of the court, seem to cover the issues involved, and if there were no other errors the judgment would have to stand.

3. While the jury were deliberating they requested to be allowed to examine some of the exhibits that had been introduced in evidence. The defendants objected as to some of the exhibits, and the plaintiffs as to others, and the court held that it was improper to allow any of them to be inspected by the jury, except by consent of counsel. This is claimed to be error. The court was certainly wrong as to his power in that regard. The matter rests in the wise discretion of the court. 2 Thomp. Trials, § 2575; *Baxter v. C. & N. W. R. Co.*, *ante*, p. 307. It is a power to be exercised with prudence and discrimination. Situations might arise when the jury might be greatly helped by an inspection of some books or writing in evidence. Trial courts are well able to take care of these matters, and it would be an extreme case, with apparent injustice, that would warrant interference by this court.

4. We come now to the most serious question in the case. We are asked to set aside the findings of the jury on the question of fraud and false swearing, as being inconsistent and contrary to the overwhelming weight of the evidence. The importance of this question to the parties, and the large amount involved in this litigation, has led us to examine the evidence with great care, and to canvass it in all its various aspects. Many cases have been decided in this court in which the rules that govern in cases of this kind have been laid down. That they are not all in perfect accord is certain, but running through them all is the underlying principle that, when all the reasonable probabilities, together with the overwhelming weight of testimony, is against the verdict, it cannot stand, even though it has passed the scrutiny of the trial court. In *Bank of Commerce v. Ross*, 91

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Wis. 320, Mr. Justice PINNEY stated the rule to be that where there was evidence on both sides of a question, and the court below had denied a new trial, this court was powerless to grant relief, unless it could be said that there was an *entire want* of competent evidence to support the verdict. This was stating the rule with greater strictness than was ever laid down in any case before or since. Such a rule would practically foreclose this court from examining into the evidence in a case, if it were found that one witness had sworn to the existence of facts that would support the verdict, although he might be impeached by all of the surrounding circumstances. Great deference is always paid by this court to the decision of the lower court upon questions of evidence, but cases arise when it is apparent that the judge has overlooked or ignored some of the potent facts in the case, and has suffered a verdict to stand when it ought to have been set aside. In *Badger v. Janesville Cotton Mills*, 95 Wis. 599, it was said: "The jury will not be warranted in finding the existence of a fact on the positive testimony of a witness, which is contrary to conceded facts or matters of common knowledge, or to all reasonable probabilities." This rule has been approved in *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615; *Flaherty v. Harrison*, 98 Wis. 559; *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352, and other cases. When it appears that the trial court has sustained a verdict upon testimony contrary to the great weight of the evidence, and which is impeached or rendered improbable by other conceded facts in the case, or is against all the reasonable inferences or probabilities in the case, this court is bound to, and will, interfere for the relief of the aggrieved party.

With these principles of law in mind, we will proceed to a consideration of the facts in this case. The jury have found that plaintiffs made no false entries in their books; that they were not guilty of any false swearing, either in the proofs of loss or in their examination under the policy;

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that the lumber destroyed was 2,602,544 feet, exclusive of the bicycle strips and shingles; and that it was all of the value of $27,109.75. If there had been no false entries in their books or inventory, and no false statements made as to the amount of the property destroyed, in absence of other testimony, one would naturally look for harmony between the amounts claimed by the plaintiffs in their proofs of loss and the amount found by the jury. The proofs of loss furnished defendants, taken from their books, show that they had on hand 3,011,032 feet of lumber, or about 400,000 feet more than found by the jury. The total property destroyed was valued in the proofs of loss at $32,065.04, or nearly $5,000 more than the value found by the jury. These facts may not be of any special significance in themselves, but, when it is considered how the plaintiffs came to arrive at the amount of lumber on hand, we are not able to harmonize the answers of the jury. Assuming that there were no false entries in the books or inventory, as the jury have found, then certainly the jury should have found the *amount* of lumber destroyed to correspond to the amount shown thereby. We get from the books and the testimony of the plaintiffs the following figures:

| | |
|---|---|
| Lumber in the inventory | 1,606,789 feet. |
| Logs from their land | 1,187,720 " |
| Logs purchased | 454,730 " |
| Total | 3,249,189 " |

From this amount, under the undisputed testimony, there should be deducted 286,591 feet of lumber sold, and, according to plaintiffs' claim, 124,103 feet of logs on hand. This would leave over 230,000 feet more lumber than the jury found, and does not take into consideration any overrun in the manufacture of the logs, which, under the testimony, would be from ten to fifteen per cent. Under no possible theory of the evidence can the figures shown by the books

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and the inventory be harmonized with the findings of the jury. Either the books are false or the jury's answers are wrong. But, assuming that these inconsistencies alone are not sufficient to overturn the verdict, we will inquire into the evidence touching the amount of lumber on hand at the time of the fire. In making up this amount, the proof shows that three items were considered: logs purchased from farmers, logs cut on a quarter section owned by plaintiffs, and an inventory made by them December 29, 1897. The most of the testimony in regard to these matters was given by the plaintiff *Henry*, who was the bookkeeper and log scaler and had general charge of these matters. On his examination before suit, under the policy, he gave the amount of logs purchased from farmers as 454,730 feet, which is the same amount that is included in making up proofs of loss. Upon his examination as an adverse party he gave a list of the farmers, with the amounts corresponding with amounts shown by his scale books and with his books of account. He gave substantially the same testimony on the trial, and this item of the loss depends mainly upon his testimony.

The logs in question were purchased from some twenty different farmers, and scale was kept in two scale books by the plaintiff *Henry*. The logs so delivered were also credited on the firm's ledger. The defendants claim that there are over 100,000 feet of these logs credited to six different farmers that were never in fact delivered by them and never paid for. *Henry* testifies that the logs were all delivered, scaled, and credited, and all or the most of them paid for. The farmers in question were each called as witnesses, and five of them deny positively and unequivocally having delivered the portion of the logs in dispute, and deny ever having received pay therefor. One Albert Rabe is credited with 17,610 feet of logs, consisting of birch, basswood, and soft and rock elm, of the value of $69.35. He insists that he only delivered about 2,000 feet of rock elm to pay for

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sawing some hemlock lumber. On one of the pages of the scale book is a credit which about corresponds with this claim. The remainder were delivered at a later date, but the ledger account fails to show the time. *Henry* testified that the logs were delivered, and a cash settlement made with Rabe's mother. The latter, being called, said that her son only delivered about 2,000 feet of elm logs, and that she received 150 pounds of flour, a pair of rubbers worth seventy-five cents, and forty-five cents worth of sugar, and no money. William Schmule is credited with 32,840 feet of logs. This witness had a pass book, and says that *Henry* scaled and entered all logs he hauled therein. The logs in dispute, amounting to about 16,000 feet, are all on one page of the scale book kept by *Henry*, and do not appear on the witness's books. They are credited on the ledger with the date left blank. He admits a settlement for the logs shown on the pass books, and says that he hauled no other logs. Charles Schuman is credited with over 19,000 feet more than his pass book shows, and more than he claims he hauled. He settled with plaintiffs on the basis of the logs shown on the pass book, and took receipt, which was offered in evidence. The logs credited, not shown on his pass book, show that he has a balance of $53.49 due him of which he knew nothing. Another witness, Herman Krueger, had no pass book, and thinks he drew only 10,000 or 15,000 feet, but is credited with over 30,000 feet. Louis Roehmer had a pass book which showed all the logs he hauled, all rock elm, and that he settled by the scale in his books. He was not certain as to the delivery of basswood, but did not deliver any soft elm or birch logs, and did not receive the sum in cash, as shown by the plaintiffs' ledger account. Borneman, another witness, says he sold them some rock elm and maple, as near as he could tell about 2,000 feet. Did not cut any basswood logs that winter. Hauled the logs he sold them to pay a saw bill. The ledger

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account shows a credit of a few dollars. In considering this phase of the case, it is significant to note that each one of these several witnesses disagrees with the witness *Henry* in very important particulars. If it were but one or two instances, it might be excused on the ground of mistake. These witnesses are all disinterested. They are farmers living in the country, and to them transactions of this kind are important. It is against all human probability that these men should have hauled these logs and not known anything about it. The scale books and ledger accounts are in such shape as to raise suspicions that they had been padded, and, when compared with the farmers' pass books, the conclusion is well-nigh irresistible that some one is in the wrong. The witness *Henry* is utterly unable to explain these differences on any reasonable hypotheses. He simply adheres to the proposition that he purchased these logs and paid for them.

Turning now to logs cut from lands owned by plaintiffs, the defendants insist that the scale books showing the logs taken from these lands have been padded to the amount of over 300,000 feet. The timber was logged by three different contractors. The scale was kept in books marked Exhibits Y and Z. These books show the number of feet to be as heretofore stated, as claimed by the plaintiffs, and the amount was testified to by the plaintiff *Henry*. The alleged excess is found on Exhibit Y, on eleven pages, almost immediately following the alleged false entries in relation to the farmers' logs. *Henry* claimed that they had men cutting on the land, and that these logs were hauled by their own teams. Each one of the contractors testified that the logs were cut by their own men, and none were cut by the plaintiffs. When the logs were hauled, they kept in the scale book the name of each teamster, but that was omitted on these pages in question. A ledger account was kept with the contractors, and the total number of feet credited to them is 885,740

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feet, and for this amount they were settled with and paid. The logs on these eleven pages seem never to have been credited to the contractors, and *Henry* is entirely unable to explain the discrepancy. Excluding these pages, the books show 886,730,—a few feet more than the contractors' account shows. The land was looked over and scaled by two timber scalers. One made 2,996 trees, scaling 896,128 feet. The other, a witness for plaintiffs, found 3,109 trees, with 1,207,702 feet. With only 113 more trees, he finds over 300,000 feet more of lumber than the other scaler. His scale was tested by another scaler of large experience, and was found to overrun the latter's scale to quite an amount. A significant fact in this connection is that the number of logs found on the scale books, excluding the eleven pages, is 8,179, and the number found by plaintiffs' scaler, above referred to, is 8,379. The eleven excluded pages show 2,044 logs, or over 1,700 logs more than the top and stump scale shows. While the scale made by their scaler tends to corroborate the scale in the books as to the number of feet, it impeaches it as to the number of logs. The testimony of *Henry* on this branch of the case is far from satisfactory. He is contradicted by the contractors in all important particulars. His scale book and ledger accounts do not agree, and he is unable to give any satisfactory explanation of the differences. Right here may be noted a fact of some significance. The logs shown on the scale books, excluding the eleven pages, average about 108 feet to the log, while those on the excluded pages average over 147 feet to the log. It hardly seems credible that any such difference could exist. If the scale made by *Henry* of the logs first mentioned is correct, it tends to impeach the scale made by their scaler in the woods, as his scale shows that the logs average over 142 feet to the log. There is nothing in the case to reconcile these differences, except the testimony of the plaintiff *Henry*. He is unable to harmonize his state-

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ments with his ledger account, and he is disputed by the other witnesses and by every reasonable probability. So strong are these facts that his story seems incredible.

As to the alleged inventory, the testimony is not quite so positive against its integrity. On December 29, 1897, the yard is said to have contained 1,606,739 feet of lumber. This was included in the proofs of loss, and from which they deducted 100,000 feet as lumber sold before the fire. On the trial the plaintiffs admitted that they had sold 286,591 feet, showing that the loss was swollen 186,591 feet, of the value of about $1,800. *Henry* appeared before the board of review of the town, and claimed that he had only about 700,000 feet of lumber in the yard, and said he did not think he was sworn. The town clerk testified that he was sworn and said he had only 700,000 feet, one half culls. The assessor called to support the plaintiffs said he estimated the lumber at about 2,000,000 feet, in 100 piles, which he counted. It was conclusively shown that, if there was only that number of piles, there could not have been any such amount of lumber, according to the size of the piles. During the summer and fall of 1897 the plaintiffs had repeated inquiries as to the stock on hand from would-be purchasers. They sent out stock sheets to the inquirers, which were introduced in evidence. These statements show less than one fourth the amount of timber on hand for sale they claim they had in December following. About December 1st the Mississippi Valley Lumberman sent out inquiries to ascertain the amount of lumber on hand. A postal card was introduced in evidence, claimed to be in the handwriting of one of the plaintiffs, upon which it is shown that their stock of hardwood was 900,000 feet. During the forepart of the year 1898 several buyers visited the yard and looked it over, and from a casual examination estimated that it contained from 550,000 to 700,000 feet. After the loss, and under the terms of the policy, the parties appointed three disinterested

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lumbermen as arbitrators to estimate the loss. They examined the yard, counted the pile bottoms as near as they could, and obtained such information as was possible to secure. They concluded that 152 piles of lumber had been destroyed. Taking the piles at an average of 12,000 feet, they figured the yard, at its fullest capacity, would have 1,800,000 feet. The evidence of plaintiffs tends to show that the yard would hold more piles of lumber than the arbitrators figured upon, and the yard was fairly full of lumber. The whole testimony left this matter upon fairly debatable ground, and, except for the almost conclusive testimony upon the other branches of the case, we should hesitate to disturb the verdict. There are, however, very many suspicious circumstances attending this branch of the case. *Henry's* statement before the board of review might be reconciled with the chronic habit of taxpayers to attempt to dodge taxation. But it seems hardly credible that the firm, desirous of selling their stock and securing purchasers therefor, should list it at less than one fourth the quantity it contained. The testimony of the arbitrators, while not conclusive, has a strong tendency to support the defendants' contention. A review of the whole evidence convinces us that the verdict is inconsistent and contrary to the great weight of the evidence and against all the reasonable probabilities in the case.

5. During the argument of the case to the jury plaintiffs' counsel, Mr. Hogan, referred several times to matters not in evidence, which had a tendency to inflame the minds of the jury against the defendants. Upon objection being made, counsel admitted his error and withdrew his remarks, and the court admonished the jury not to consider them. We refer to these matters only to suggest that counsel traveled very near the danger line, and that frequent or continued lapses of this kind, in a close case, might render it necessary to reverse the case, although the jury were directed

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to disregard them. *Brown v. Swineford*, 44 Wis. 282; *Rudiger v. C., St. P., M. & O. R. Co.* 101 Wis. 292.

*By the Court.*— The judgment of the circuit court is reversed, and the cause is remanded for a new trial. In taxing costs the clerk will exclude so much of the printed case as relates to, and is properly taxable upon, the appeal of the George E. Foster Lumber Company.

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117 538

WUNDERLICH and another, Respondents, vs. THE PALATINE FIRE INSURANCE COMPANY and others, Respondents, and THE GEORGE E. FOSTER LUMBER COMPANY, Appellant.

*October 2 — October 20, 1899.*

*Fire insurance: "Open policy:" Executory contract of sale: Vendee's right to insurance money: "Loss payable" clause: Agency: Destruction of subject matter: Implied condition excusing delivery.*

1. *It would seem* that a policy of fire insurance covering lumber owned by the insured "or held in trust or on commission, or sold but not delivered, piled in their mill yard," is not an "open policy" such as would authorize the owner of any such lumber, in case of loss, to sue directly for the insurance on his property.
2. Where the insured property in such case was covered by an executory contract of sale but none of it, at the time of its destruction, had been so separated or delivered as to vest any title in the vendee, the vendors' right of recovery on the policy was complete without the "sold and not delivered" clause, and was not affected by it unless they were thereby absolved from some disclosure as to the sale otherwise required under the policy; and the vendee had no interest in the lumber which would give it a right of action against the insurer, even construing the policy as an open one.
3. A provision in a policy of insurance that the loss shall be payable to a third person as his interest may appear does not give such person an independent right of action against the insurer, but the question whether he has any, and if so what, interest in the insurance money by virtue thereof is entirely between him and the insured, and bears merely on the distribution of such sum as the latter may ultimately recover.

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4. The vendors of a portion of the lumber in a mill yard under an executory contract requiring them to keep the lumber insured, with policies to be assigned to the vendee as its interest might appear, took out policies in their own names, in some of which the loss was made payable as provided in the contract, but in all of which their relation to the companies was the same as to all lumber in their yard, without distinguishing or differentiating that covered by the contract. *Held*, that the vendors did not act as agents of the vendee in effecting the insurance.
5. The clause in such contract requiring the vendors to insure the lumber with policies assigned to the vendee as its interest might appear was intended to secure the vendee to the extent of the advances which it might make upon the lumber while it remained in the possession of the vendors, and not against the loss of profits which would be occasioned by the destruction of the property.
6. The implication of a condition in the contract for the sale of the lumber that delivery should be excused in the event of its destruction is *held* not to be excluded by the agreement to keep it insured with policies assigned to the vendee as its interest might appear,—such agreement not being equivalent to an agreement by the vendors themselves to insure the property or its existence.

APPEAL from judgments of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

The defendants, sundry insurance companies, insured the plaintiffs, Wunderlich Bros., to the amount of about $24,000, "on lumber," etc., "owned by Wunderlich Bros., or held in trust or on commission, or sold but not delivered, piled in their mill yard," commonly designated the "lumber clause." Certain of these policies, amounting to some $12,000 or $14,000, also contained what is known as the "loss-payable clause," viz.: "Loss, if any, payable to *George E. Foster Lumber Company*, as their interest may appear." On May 6, 1898, the entire stock of lumber, claimed to aggregate about $30,000 in value, was destroyed by fire, and the plaintiffs brought suit for the insurance against the insurance companies, defendants. The *George E. Foster Lumber Company* was impleaded upon an order of the court, and served a pleading called an answer and a cross complaint, in which

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it set up, besides the writing of the policies above mentioned, the fact that on February 23, 1898, the plaintiffs made to it a proposition as follows:

"We hereby give you an option to buy, as you may elect, all our lumber of the following kind, which we may have sawed and will saw during this season, at the following prices, f. o. b. Antigo: [Different kinds and grades of lumber specified, with prices]; to be hauled and shipped whenever you direct, you to pay fifty per cent. cash as fast as every 300 M. are in piles, and balance as fast as shipped. We to keep lumber insured for one year, and policies to be assigned to you as your interest may appear. . . . All lumber to be shipped not later than November 1, 1898, or paid for less the amount of hauling and loading as near as can be estimated. We will have about 600 M. basswood, 600 M. soft elm, and 350 M. birch."

That option was accepted the following day according to its terms. None of the lumber so bargained for had been separated or ascertained at the time of the fire, but was mixed in the piles with other grades not purchased.

It was further alleged by the appellant that the purchase price of said lumber was about the sum of $12,000, of which it paid $2,000 at the time of making the bargain, and that the value of the lumber at the time of the fire was about $17,000. Appellant also alleged that at the time of said first contract it was agreed and understood that, whether the title to said lumber passed to the defendant or not, its interest therein was and should be the entire value of the lumber, less the amount of the unpaid purchase price, and the word "interest" in said contract was used in that meaning; that the agreement to keep the lumber insured and policies assigned to it as its interest might appear was understood to require policies to be assigned to the full value of the lumber sold to it; that the indorsement upon the policies of the "loss-payable clause" was made at the request

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of the plaintiffs, without the knowledge of the defendant as to the amount thereof; that the defendant did not accept such policies as a compliance with the provisions of its contract; and that the plaintiffs failed and neglected to make payable to said defendant enough of said insurance to cover the full value of its said lumber,—and prayed, as against the plaintiffs, that a proportionate part of all insurance recoverable by them should be adjudged to be payable to the appellant. And by its so-called "cross-complaint" setting up substantially the same facts, it prayed that it might recover from the defendant insurance companies, by virtue of the so-called "lumber clause," the proportion of the total insurance which the market value of the lumber contracted to be sold to it bore to all the lumber in the yard, to wit, about seventeen thirtieths; and by a second so-called cross complaint, addressed to those insurance companies in whose policies was found the "loss-payable clause," demanded recovery of the full amounts of their respective policies, having alleged in addition, as to them, the giving of notice and proofs of loss. The defendant insurance companies defended against any liability to the plaintiffs on the ground of their fraudulent representations in the making of proofs of loss, which controversy is still undetermined.

Upon the trial of the issues raised by the appellant's pleading, the defendant companies objected to any evidence under the cross complaint as to them, which objection was sustained, and judgment rendered in favor of the defendant companies and against the appellant, dismissing its cross complaint. Upon the issue between the plaintiffs and the appellant a similar objection was sustained, except as to the one fact, which was established and found, of a tender before the commencement of the suit by the plaintiffs to the appellant of the $2,000 paid by the latter upon the contract of purchase, with interest to the time of such tender; that said tender had been kept good, and was confirmed by the

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delivery of the money at that time into the hands of the clerk. Judgment was thereupon rendered against the appellant upon its answer and prayer for relief against the plaintiffs, with costs. The appeal is from both said judgments.

For the appellant there were briefs by *Van Hecke & Smart*, and oral argument by *E. M. Smart*. They contended, *inter alia*, that an agreement for insurance is an express provision, negativing any implied condition of continued future existence of the subject matter. Where a person contracts to *procure* insurance on property, or it is his duty to do so as an agent, in case of a breach of the contract or duty he must respond in damages to the amount he should have insured for, and becomes himself the insurer. *McAlpine v. St. Clara F. Academy*, 101 Wis. 468; *Lancaster Mills v. Merchants' C. P. Co.* 24 Am. St. Rep. 586, 609; Beach, Cont. § 1710; *Lindsay v. Pettigrew*, 5 S. Dak. 500; Sutherland, Dam. (2d ed.), §§ 772, 862; 1 Am. & Eng. Ency. of Law (2d ed.), 1068; *Strong v. Manufacturers' Ins. Co.* 20 Am. Dec. 515, note; *De Tastett v. Crousillat*, 2 Wash. C. C. 132; *Park v. Hamond*, 4 Campb. 344; *Douglass v. Murphy*, 16 U. C. Q. B. 113. Appellant is a direct party to the insurance contracts; it is not merely an appointee named to receive moneys which plaintiffs may recover; it may sue and recover directly in its own right. The clause "in trust or on commission, or sold but not delivered," is in legal effect the same as "for whom it may concern." *California Ins. Co. v. Union C. Co.* 133 U. S. 387, 409; *Lee v. Adsit*, 37 N. Y. 87, 90; *De Forest v. Fulton F. Ins. Co.* 1 Hall, 135. If anything it is broader in its scope because it was held that "for whom it may concern" did not include anything but a legal interest or ownership. That is, it would not cover liens or other equitable interests outside of those of the nominal insured. *McDonald v. Black's Adm'r*, 55 Am. Dec. 448, 452. But see *contra*, *Pacific Ins. Co. v. Catlett*, 4 Wend. 75, 79. But the words "sold, but not

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delivered" cover our case exactly. They relate to goods of which there is an executory sale, but no legal delivery so as to pass legal title. *Waring v. Indemnity F. Ins. Co.* 6 Am. Rep. 146, 148; *Lockhart v. Cooper*, 42 Am. Rep. 514, 517; *Lucas v. Ins. Co.* 48 Am. Rep. 383, 389. The words "in trust" mean "goods with which the assured was intrusted, not goods held in trust in the strict legal sense." *Strohn v. Hartford F. Ins. Co.* 33 Wis. 648, 655; *Home Ins. Co. v. Baltimore W. Co.* 93 U. S. 527. The person in whose name the insurance policy is issued may sue and recover the whole amount as trustee, etc.; but the beneficiary may also sue in his own name and in his own behalf directly on the policy as if he were particularly named therein. *Strohn v. Hartford F. Ins. Co.* 33 Wis. 648; *Johannes v. Phenix Ins. Co.* 66 Wis. 50, 56; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6, 18; *Somes v. Equitable S. Ins. Co.* 12 Gray, 531; *Farrow v. Comm. Ins. Co.* 18 Pick. 53; *Williams v. Ocean Ins. Co.* 2 Met. 306; *Pacific Mut. Ins. Co. v. Catlett*, 4 Wend. 79; *Lazarus v. Comm. Ins. Co.* 5 Pick. 76; *Sargent v. Morris*, 3 Barn. & Ald. 280; *Sleeper v. Union Ins. Co.* 20 Am. Rep. 706; *Ballard v. Merchants' Ins. Co.* 29 Am. Dec. 444; 1 Ency. of Pl. & Pr. 392, note; 8 Am. & Eng. Ency. of Law (1st ed.), 88, 89.

*T. W. Hogan* and *John Barnes*, for the plaintiffs.

For the defendant insurance companies there was a brief by *Mylrea & Bird*, and oral argument by *W. H. Mylrea* and *C. B. Bird*.

DODGE, J. 1. That portion of the answer which is designated as a "cross complaint" seeks to set up an independent cause of action in favor of the appellant against the insurance companies upon two grounds:

*First*, as against all the companies, upon the proposition that the so-called "lumber clause" results in insurance to whomever may prove to be the owner of any lumber held

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by Wunderlich Bros. on commission, in trust, or sold and not delivered, and that the owner of such property may sue direct for the insurance upon such property. A large number of authorities are presented by appellant's counsel to the proposition that under "open policies," running "to whom it may concern," or "to John Doe, for the benefit of whom it may concern," or "to John Doe, for the benefit of the owners," the insurer is in direct privity with the owner, and the latter may sue to recover the insurance upon his property; amongst which authorities is the decision of our own court in *Strohn v. Hartford F. Ins. Co.* 33 Wis. 648. He thereupon contends that the force and effect of the "lumber clause" in these policies is the same. It would seem, as an original proposition, that the distinction between the two kinds of policies is most marked. A contract to insure "A. B., or whom it may concern," or to insure "the owners," against loss upon certain property, is very different from one to insure A. B. against loss on the same property, whether he owns it wholly or others have rights in it. In the first instance, the very contract itself recognizes an uncertainty as to the parties thereto, and a willingness and intent on the part of the insurer to enter into contractual relations with undisclosed and even changing parties on the other side. The latter, however, just as clearly evinces intent to confine the contractual relation to the person named. In the one case the very words and obvious intent of the contract are effectuated by treating whomever is concerned or whomever is the owner as the insured and entitled to sue, while in the other the imposition upon the insurer of any one as its promisee other than the person specified is in contradiction of the words of the contract. In *Johannes v. Phenix Ins. Co.* 66 Wis. 50, the distinction is well illustrated. It is not surprising, therefore, that the equivalence of these two provisions is substantially unsupported by authority, except for an *obiter* remark in the individual opinion of a judge of



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the superior court of New York city in *De Forest v. Fulton F. Ins. Co.* 1 Hall, 84, 135. However, neither this question, nor several others discussed, need be answered in this case; for the appellant concedes, as indeed the facts establish, that he was not the owner of any of the burned lumber. His contract of purchase, up to the time of the fire, was wholly executory, and none had been so separated or so delivered as to vest any title in appellant. It all remained the absolute property of the plaintiffs, whose right of recovery against the insurance companies is therefore complete, without the "sold and not delivered" clause, and is not enlarged by it, unless, perhaps, they are thereby absolved from some disclosure as to the fact of sale otherwise required by the policy. Even if this were an open policy, the appellant has no ownership or interest in the lumber to give it a right of action against the insurer.

*Second.* Appellant asserts an independent right of action against certain of the defendant companies by virtue of the provision that loss should be payable to it as its interest might appear. It made proofs of loss under those policies, and insists that its right of recovery cannot be prejudiced by any frauds of plaintiffs in their proofs. The rights of a claimant under this familiar clause, where the title and ownership of the property remains in the assured, are no longer open to doubt or debate in this state. They were settled by *Chandos v. Am. F. Ins. Co.* 84 Wis. 184; *Carberry v. German Ins. Co.* 86 Wis. 323; and *Williamson v. Mich. F. & M. Ins. Co.* 86 Wis. 393. The contract is with the assured, to him alone is the insurer liable, and upon his acts will that liability depend. The claimant under such a provision is not an assignee of the policy so as to hold an independent right of recovery, but a mere appointee to receive the whole or a part of the money which the assured is entitled to recover, but to receive it under and in the right of the assured. The question whether any, and if so what, interest the ap-

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pellant here may have, by virtue of that clause, to any portion of the insurance money, is entirely between it and the plaintiffs, and bears merely on the distribution of such sum as the latter may ultimately recover.

A further claim by appellant, that the transactions amounted to an insurance to it upon its interest in the contract of purchase of the lumber, taken out by the plaintiffs as its agents and on its behalf, is not at all borne out. In the first place, no such agency was created by the contract of purchase. That instrument stipulated, not that the plaintiffs should procure insurance for the benefit of appellant upon its interest either in the lumber or in the contract, but should insure the lumber itself, which belonged to plaintiffs themselves. The transactions between plaintiffs and the insurance companies, consistently with that stipulation, show a dealing entirely on their own behalf, and the taking of policies in which they were the payees, and in all of which their relation to the insurance companies was the same as to all lumber in their yard, without distinguishing or differentiating that which appellant had agreed to purchase. All these circumstances exclude the existence of any idea of agency in the minds of either of the contracting parties at the writing of these policies.

We agree with the conclusion of the circuit court that, under the allegations of the cross-complaint portion of appellant's answer, the appellant has no independent right of action or recovery against the defendant companies.

2. Turning now to that portion of the appellant's answer which relates to its claim against such insurance money as may be recovered by the plaintiffs, the appellant's contention is that the word "interest" in the clause of the contract whereby the plaintiffs agreed to keep the lumber insured for one year, and policies assigned to appellant as its interest may appear, is to be construed as meaning the loss which would fall on appellant by destruction of the prop-

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erty, to wit, the difference between the market value of the lumber and the unpaid portion of the purchase price, thus including the profit resulting from any appreciation. The plaintiffs' contention, on the other hand, is that the word "interest" was used by both parties to mean the amount which appellant had actually paid upon the lumber, and to the return of which it would be entitled upon the destruction of the property so that the contract of sale could not be carried out. The question, of course, is, What was, in fact, the intention of the parties in the use of these words? for they had a perfect right to stipulate between themselves as they chose for the payment of any sum, or for the acquisition of any rights in the insurance, in the event of loss by fire. The word "interest" is used loosely, and is open to construction; for, as we have already pointed out, the appellant acquired no actual interest in the lumber itself, and the word is used, not in that sense, but as indicating some other interest or right which appellant might have under its contract, and which the parties intended to protect. It is not unusual to indorse and deliver policies of insurance with the same expression here present merely to secure simple-contract debts, the interest of the transferee of the policy being, not in the property itself, but merely in the continued solvency of the assured. The expression is also frequently used in cases such as that presented to this court in *McAlpine v. St. Clara F. Academy*, 101 Wis. 468, where one is expending money in the improvement of property, title to which is in another. On the other hand, we think the instances in actual business transactions where an attempt is made by such an expression to secure either profits in a transaction, or liability of one party for damages upon breach of a contract, are extremely rare, if not quite unknown. In the case at bar, in the event of sufficient depreciation in market value, the application of appellant's construction would leave it without security for the repay-

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ment of its advances, although plaintiffs might be liable therefor upon abrogation of the contract,—a very improbable purpose. We must, of course, ascertain the intention of the parties to these transactions from the writings themselves, construed in the light of the surrounding circumstances. So considering them, and in view of the common experience of business affairs, we are impelled to the conclusion that the plaintiffs' contention is correct, and that the actual intention was that the appellant should be secured to the extent of the advances which it might make upon this lumber while it remained in the possession of the plaintiffs. Upon this view of the rights of the parties, the plaintiffs, before suit, had tendered, and upon the trial perfected the tender of, all to which appellant would be entitled out of the insurance money, and judgment denying the claim of the appellant in this action against such fund was proper.

There remains one further contention of appellant, which, as it has been fully argued, should receive consideration, namely, that the implication of a condition in the contract for sale of the lumber that performance be excused in the event of destruction of the specific property is excluded by the agreement to keep the same insured, and that plaintiffs are therefore liable to appellant for breach of such contract in damages equal to the market value, less the unpaid purchase price. Appellant concedes that ordinarily such condition is to be implied in executory contracts for sale of specific articles, on the authority of *McMillan v. Fox*, 90 Wis. 173, and *Cook v. McCabe*, 53 Wis. 250, but urges that such implication is always subject to the express agreement of the parties that the seller may assume the risk of the continued existence of the property, and that such assumption may be accomplished by such expressions as the "vendor warrants or insures" such continued existence. These propositions may all be conceded, but we are still confronted

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with the question of construction in the present contract, What did the parties actually intend? The implication of an understanding that performance of such a contract is to be dependent on the existence of the thing bargained is so strong, and so in accord with common experience, that it should yield only to clear expression of a contrary purpose. The words before us are not sufficient to that end. An agreement to keep insured with policies assigned as interest may appear is by no means identical with an agreement by the party himself to insure the property or its existence. *Johnson v. Campbell*, 120 Mass. 449, 453. We have already pointed out a very different meaning as in our opinion the true one, namely, to secure to appellant return of the advances it should make, which is entirely consistent with the understanding that plaintiff should be excused from delivery of the lumber in case of its destruction, and, being so consistent, should be adopted, rather than one which does violence to it.

*By the Court.*—The respective judgments are affirmed. Respondent insurance companies will be allowed to tax in their costs for printing fifty-three pages of the printed case used jointly in this case and No. 59 (*Wunderlich v. Palatine F. Ins. Co.*, *ante*, p. 382).

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GOSSENS, Appellant, vs. THE MATTOON MANUFACTURING COMPANY, Respondent.

*October 2 — October 20, 1899.*

***Master and servant: Personal injuries: Contributory negligence.***

**Plaintiff, an unskilled laborer about a planing mill, was injured while temporarily assisting in the operation of a planer by direction of the foreman. His testimony showed, among other things, that he knew the purpose of the planer and could have seen the uncovered**

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knives in it if he had looked; that he put his hand on the machine without looking, in order to increase his strength while attempting to turn a wheel for the purpose of releasing a board which had stuck; and that his hand came in contact with the knives. *Held*, that he was guilty of contributory negligence.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Wigman & Martin*, and oral argument by *J. H. M. Wigman.*

For the respondent the cause was submitted on the brief of *Francis Williams.*

CASSODAY, C. J. This action was commenced June 1, 1895, to recover damages for personal injuries sustained by the plaintiff December 22, 1891, while in the employ of the defendant. At the close of the testimony the court granted a nonsuit, and from the judgment entered thereon the plaintiff brings this appeal.

On the trial the plaintiff testified, through an interpreter, to the effect that he was a Hollander, and came to the United States July 4, 1889, and when he was forty-two years of age; that he commenced working for the defendant a few days thereafter,— drove horses, was chore boy around the barn and boarding house, and piling lumber; that on the day of the accident he was unloading boards from a wagon, and placing them in the defendant's planing mill; that up to that time he had never worked on a planer, or any other machine, but had unloaded boards from the front of the machine; that, without giving him any instruction or warning, the defendant's foreman, on the morning of the accident, directed him to go behind the planer and load on some of the boards that had been through the planer; that he did not go at first, but when the foreman insisted upon his doing so he did so; that he took the boards out of the planer, and loaded them onto the wagon; that after continuing

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that work about ten minutes one of the boards got stuck, and the foreman told him to try and turn the wheel back, so that he, the foreman, could take the board out; that he tried to move the wheel both ways, but could not; that the foreman then told him that he must; that he then took his other hand, and got it somewhere on the planer, and it came in contact with the unguarded edge of the knives on the top of the planer, and so injured his fingers that three of them had to be amputated; that he did not know there were knives where he so put his hand; that before that he had shoved boards to the planer, but had not worked on the planer; that he did not look to see if he could observe the knives; that he did not think of them; that he put his fingers right on the knives when he was trying to steady himself; that he believed he could have seen the knives if he had looked that way; that he knew the planer was there to cut something off,—that he knew a board was cut when it ran through the planer; that he did not look around for knives; that there was a light there; that he did not say whether he could have seen the knives if he had looked; that he laid his hand on the top of the machinery just to be stronger, but did not see the knives; that he took hold of what he could to get stronger, and did not look to see what it was; that he did believe he could have seen the knives if he had looked at the machinery, but that he did not look at the place where he was going to put his hand before doing so.

Assuming that the foreman was at fault for putting the plaintiff at the particular work mentioned without instruction or caution, and that he was without experience, still we are clearly of the opinion that the plaintiff was guilty of contributory negligence in putting his hand where he did without looking. This case is ruled by cases in this court too numerous to mention. We cite only a few of the more recent. *Hazen v. West Superior L. Co.* 91 Wis. 208; *Schultz*

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*v. C. C. Thompson L. Co.* 91 Wis. 626; *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615; *Schiefelbein v. Badger P. Co.* 101 Wis. 402; *Foss v. Bigelow*, 102 Wis. 413; *Kerrigan v. C., M. & St. P. R. Co.*, *ante*, p. 166.

*By the Court.*— The judgment of the circuit court is affirmed.

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KOENIG and another, Appellants, vs. THE CITY OF WATERTOWN, Respondent.

*September 27 — November 7, 1899.*

*Waters: Easements: Injunction against filling up reservoir.*

A flume and mill races below a dam constituted a reservoir from which, by virtue of a certain agreement and conveyances between the predecessors in interest of the respective parties, plaintiffs had the right to draw water for their flouring mill. The defendant city, having become the owner of the fee of a part of the land on which such flume and races were, threatened to fill them up on the land so acquired and across an adjoining public street. Such a reduction in the size and capacity of the reservoir would tend, at certain stages of the water in the river, to reduce the supply of water at plaintiffs' mill and impair the use of their property. *Held*, that the remedy at law would be inadequate and that plaintiffs were entitled to have such filling restrained by injunction.

APPEAL from an order of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

For the appellants there were briefs by *R. B. & I. B. Kirkland*, and oral argument by *I. B. Kirkland*. To the point that the plaintiffs had no adequate remedy at law for the change that is threatened, they cited Fetter, Equity, 290, 299; Willard, Eq. Jur. 370, 373; 2 Bl. Comm. 282; 10 Am. & Eng. Ency. of Law (1st ed.), 823, note 1; *Brock v. Dole*, 66 Wis. 142; High, Injunctions (3d ed.), §§ 649, 702; *Wilson v. Mineral Point*, 39 Wis. 160; *Kimberly & Clark Co. v.*

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*Hewitt*, 75 Wis. 371; *Lawson v. Menasha W. W. Co.* 59 Wis. 393; *Lyon v. McLaughlin*, 32 Vt. 425; *Valley P. & P. Co. v. West*, 58 Wis. 599; *Scudder v. Trenton D. F. Co.* 23 Am. Dec. 756; *Troe v. Larson*, 84 Iowa, 649; *Musch v. Burkhart*, 12 L. R. A. 484; Gould, Waters, § 509.

*Harlow Pease*, for the respondent.

CASSODAY, C. J. This is an appeal from an order sustaining a demurrer to the complaint in an action to restrain the defendant from carrying out the resolution of the defendant and filling in the mill race from defendant's southerly end to the north line of Milwaukee street, or any part thereof.

The complaint alleges, in effect, that at the time of the commencement of this action, and for more than forty years next prior thereto, there was a dam across Rock river at the place described, and a water power created thereby, and the same was then within the limits of the defendant city, and also a mill race and flume connected with and appurtenant to the dam, on the east side of the river, and near thereto, which mill race and flume extended from the dam in a southerly direction for about 1,000 feet, running through what was commonly known as the "hydraulic reserve" and blocks 30, 39, and 40 in the First ward of the city to that part of block 40 where the brick flouring mill of the Globe Milling Company formerly stood, and which a few years before was destroyed by fire; that April 27, 1886, and for some time prior thereto and thereafter, one Frank Koenig, father of the plaintiffs, since deceased, was the sole owner in fee and lawfully possessed of the undivided one-half of the whole of the dam, and of all the water power connected therewith or appurtenant thereto at the east end and eastern half thereof, subject only to certain easements or water rights; that he was also the sole owner in fee and lawfully possessed of the whole of the mill race and flume extending from the dam down to the south line of lot 1 in

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block 30; also the sole owner in fee and in the lawful possession of lot 1 in block 30; and also of a piece of land fifteen feet in width adjoining such lot on the north, and of the flouring mill and appurtenances thereto belonging and then situate thereon; and also the owner in fee and lawfully possessed of all that certain piece and parcel of land commonly known as the "hydraulic reserve," except a strip 150 feet wide off from the north end thereof, and which was several hundred feet above the dam, and had never been in any way connected with the dam or the water power appurtenant thereto; that April 27, 1886, and for some time prior thereto and thereafter, the Globe Milling Company was running, operating, and conducting a flouring mill situate on block 40, and was the sole owner in fee and lawfully possessed of the whole of block 40 and part of block 39, and thereafter acquired all of block 39, and was the sole owner in fee and lawfully possessed of all that part of the mill race and flume commencing at the south line of lot 1 in block 30 and extending and running in a southerly direction to that part of block 40 where the brick flouring mill of the Globe Milling Company then stood.

The complaint then alleges that April 27, 1886, Frank Koenig and the Globe Milling Company, being such owners, duly entered into a written agreement under seal, witnessed, acknowledged, and recorded, to the effect that the Globe Milling Company, in consideration of $7,000 to be paid to it by Frank Koenig, thereby covenanted and agreed to convey to Frank Koenig, his heirs and assigns, 4,948.8 cubic feet of water per minute, which was by the partition judgment adjudged to Miller and Sleeper, by warranty deed, subject to all charges that might thereafter accrue or should be imposed upon such water for repairs and rebuilding of the dam, and the river next above the dam on the east side of the river, and for repairing and rebuilding and maintaining the main race and flume from the dam down to the brick

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mill on block 40, all of which charges were therein assumed by Frank Koenig, except as otherwise provided, which water was to be drained by Frank Koenig, his heirs and assigns, at any or all the weirs and sites of water rights mentioned in such judgment as he or they might choose; that Frank Koenig, in consideration of such conveyance to him, thereby covenanted and agreed to convey by warranty deed to the Globe Milling Company 15,000 cubic feet of water per minute, or so much thereof as would flow or pass over the weir for the mill on block 40 of the length as determined by such partition judgment, after the weir should be raised and permanently fixed and fastened to a height of two feet below the horizontal plane of the crest of the dam above the water, to be drained from the river above the dam through the main race and flume on the east side of the river without any interference or hindrance to the free and unobstructed flow thereof through the main race and flume to the weir on block 40, provided that none of the 15,000 cubic feet of water per minute should be drawn or used at block 40, or at the mill thereon, unless or except when the water in the river above should flow over the top of the dam at some point thereof; such conveyance and grant to be subject to one third part of the repairs and improvements thereinafter to be made on the main race and flume from the dam down to the weir on block 40, and to the third of the repairs and rebuilding of the head gates in the main race and flume, all of which third part of the charges and expenses were to be assumed by the Globe Milling Company; that the main race and flume from the dam to the mill on block 40, and the head gates therein, should be owned henceforth in common by the parties thereto; that each and both of the parties, their heirs, assigns, and successors, should have the right of access to the head gates, and to any and all points on the main race and flume, over and across the lands of each other and such lands over which Frank Koenig should have re-

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served the rights of way, such access being for the purposes only of making repairs to the main race and flume and to the head gates, and rebuilding the same, and of regulating the head gates and observing the flow of water through the main race and flume and at the mills thereon, and measuring the same; that when it should become necessary, in order to repair the head gates, the main race and flume, or any of the mills taking water therefrom, either of the parties, on twenty-four hours' notice to the other, and, in case of emergency, without notice, might lower the head gates so as to shut the water out of the main race and flume; that when the stage of water in the river above the dam was so high that, if allowed to flow into the race and flume below the head gates at its full height or level, it would flow over and endanger the bank between the main race and flume and the river, then in that case the head gates might be lowered so as to reduce the height or level of the water in the main race and flume below the head gates so that the bank might not be overflowed or endangered; that the main race and flume should not thereafter be contracted or narrowed at any point, and that all the water to be drained from the main race and flume for propelling machinery of any kind should be drained over or through, as the case might be, one or more of the following designated weirs and openings, to wit: The weir of the Globe Milling Company at their mill on block 40, and when raised to be kept and permanently fastened at a height of two feet below the level of the horizontal plane of the crest of the dam, and the weir at Frank Koenig's mill at the south end of his hydraulic reserve on lot 1 in block 30, as there stated; that Frank Koenig should have the right to maintain in the main race or flume the four posts or timbers upon which his elevator then rested, and, in case a break should occur in that part of the main race or flume below his mill, or if it should become necessary to make repairs on that part of the same, then, in either case, Frank Koenig should have the right to

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make and construct in the main race or flume, below where he drains water to his mill, temporary gates or a cofferdam, which, on completion of the repairs, should be entirely removed at the sole expense of Frank Koenig, but that at all times except when it should become necessary to repair the head gates, main race, or flume, or any of the mills entitled to take water therefrom, the whole of the main race and flume should be kept well filled according as the head in the river above might be with water, which should not be shut out of the same, and the Globe Milling Company should at all times have the right to take from the main race a quantity of water sufficient to run the steam condenser in their mill on block 40; that Frank Koenig, as to the Globe Milling Company, thereby assumed two thirds of the repairs and improvements thereafter to be made upon the main race and flume from the dam above down to the weir on block 40; also the whole of the repairs and maintenance of the main weir above the dam, and two thirds of the repairs and rebuilding of the head gates, and the whole of the dam repairs and maintenance which were then chargeable to the water power on the east side of the river, but he should be free to use and secure for such repairs and maintenance such aid and help for his share thereof from the other owners (besides the Globe Milling Company) of water rights or of water to be drawn from such race or flume as was then provided for and as might thereafter be secured; that Frank Koenig and his heirs and assigns might draw all the water he or they might own appurtenant to the dam and water power, or any part thereof, at either or both of his two upper weirs, they might choose, at all times, and he and they should also have the right to sell and dispose of the same, or any part thereof, to be drawn at any or all the weirs and water-right sites mentioned in the partition judgment, but in no case should the upper weir be kept at a lower level than was therein provided for.

The complaint further alleges that thereafter, and on April

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27, 1886, in full compliance with the written agreement, the Globe Milling Company duly made, executed, and delivered to Frank Koenig its warranty deed of the property therein required by it to be so conveyed, and which deed was duly recorded April 30, 1886; that at the same time, in full compliance with such agreement, Frank Koenig duly made, executed, and delivered to the Globe Milling Company his warranty deed of the property therein required by him to be conveyed, and which deed was duly recorded April 30, 1886; that thereupon, by virtue of the agreement in such deeds, Frank Koenig and the Globe Milling Company became and were the sole owners in fee and lawfully possessed of the whole of the mill race and flume in common from the dam down to that point in block 40 where the brick flouring mill of the Globe Milling Company then stood; that April 28, 1894, Frank Koenig died testate; that his last will and testament was duly admitted to probate July 3, 1894; that by such will all of the interest of which Frank Koenig died seised in the mill race and flume was devised, in common and undivided, to Edward C. Koenig and to these plaintiffs; that the right, title, and interest of which Frank Koenig died seised in and to the property mentioned passed to and became vested in his three sons named by the judgment of the county court duly made and entered of record April 3, 1895; that before the commencement of this action Edward C. Koenig, by quitclaim deed, duly conveyed all and every his right, title, and interest in and to said mill race and flume to the plaintiffs herein; that thereafter, and before the commencement of this action, the Globe Milling Company, by three several and separate deeds of conveyance, duly conveyed to the Watertown Waterworks Company all of block 39, reserving a right (unnecessary here to mention) and which deed was duly recorded February 1, 1896; also a strip of land 100 feet wide, directly north [south?] of block 39, and the deed of which was duly recorded February 1, 1896; also

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block 40, together with the water power appurtenant thereto, and in and by which conveyance it was expressly covenanted that for a particular description of such water power and the conditions and terms under which the same was to be used reference was and is had to the deed from Frank Koenig to the Globe Milling Company, recorded April 30, 1886, and to the agreement mentioned, recorded April 30, 1886; that thereafter, and before the commencement of this action, the Watertown Waterworks Company duly conveyed to the defendant all the property theretofore conveyed by the Globe Milling Company to it, and the same was duly recorded September 23, 1896, and in and by which deed of conveyance the defendant agreed to assume the terms and conditions of the agreement theretofore entered into by and between Frank Koenig and the Globe Milling Company, and above set forth; that thereupon the plaintiffs became the owners in fee and lawfully possessed of the mill race and flume from the dam down to that part of block 40 where the flouring mill of the Globe Milling Company formerly stood, in common with the defendant.

The complaint then alleges that ever since the city acquired such right, title, and interest the plaintiffs and the defendant have been, and still were and are, the owners in fee and in lawful possession of the mill race and flume from the dam down to that part of block 40 where the flouring mill of the Globe Milling Company formerly stood, in common and undivided; that such purchase by the city was under and by virtue of an ordinance duly passed and made September 15, 1896; that the flouring mill and appurtenances on lot 1, block 30, and the strip of land north and adjacent thereto, were, before the commencement of this action, the sole property of the plaintiffs, and have been continuously in use and operation, conducted, managed, and operated solely by the plaintiffs, ever since the death of Frank Koenig, as a flouring, feed, and custom mill, with a large and lucra-

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tive business, and that the same was of great and permanent value to the plaintiffs as such flouring, feed, and custom mill; that the water used for propelling machinery of said mill was and is conducted down and through the mill race and flume, and that the same was and is of great and permanent value to the plaintiffs; that such race and flume south of their mill, and in which they have an ownership in fee in common and undivided with the defendant, is of great and permanent value to the plaintiffs as a reservoir wherein to hold water, and for other great, permanent, and valuable purposes; that the defendant, by its common council, at a regular meeting thereof duly held June 21, 1898, duly passed and adopted a resolution to cause to be filled in all of said mill race from its present southern end to the north line of Milwaukee street, and in which the plaintiffs were and are the owners in fee in common and undivided with the city; that to fill in such mill race as contemplated by such resolution, would cause great and irreparable injury to the plaintiffs in their property rights in the south end of such mill race in numerous ways therein mentioned.

The facts alleged in the complaint are somewhat complicated, but it appears from a careful reading that the mill races and flume extend from the dam down to the place where the brick flouring mill of the Globe Milling Company formerly stood,—a distance of about 1,000 feet; that from the dam south to a bridge near the mill of the plaintiffs—a distance of about 400 feet—is designated as the mill race, and which, for convenience, will be called the *upper* mill race; that from that bridge south to the north line of Milwaukee street—a distance of about 325 feet—is designated as the flume; that from the north line of Milwaukee street south to the place where the brick flouring mill of the Globe Milling Company stood when it was destroyed by fire—a distance of about 275 feet—is designated as the mill race, and which for convenience will be called the *lower* mill race;



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that the waters in the upper and lower mill races and the flume are all drawn through the same head gate at the dam, first passing from the mill pond through the head gate into the upper race, and from thence into and through the flume into the lower race; that the surface of the waters of the upper mill race, the flume, and the lower mill race have been since April 27, 1886, and now are, all practically on the same level; that the plaintiffs have succeeded to all the rights, titles, and interest which Frank Koenig had in and to the dam, the water power, the upper and lower raceways, subsequently to the agreement, conveyances, and transfers made on or about April 27, 1886, and subject to all the conditions, stipulations, and covenants contained in that agreement and those conveyances and transfers; that the defendant has succeeded to all the rights, titles, and interest which the Globe Milling Company had in and to the dam, the water power, the upper and lower raceways, subsequently to the making of the agreement, conveyances, and transfers mentioned, and subject to all the conditions, stipulations, and covenants contained in them. Thus it appears that the flume and the upper and lower mill races constituted a reservoir from which Frank Koenig and those claiming under him, and the Globe Milling Company and those claiming under it, had the legal right, in common, to draw water for their respective mills, as prescribed in the agreement, conveyances, and transfers mentioned. This action is to restrain the defendant from completely filling up the lower race, being from the north line of Milwaukee street to the south end of the lower mill race,—a distance of about 275 feet; thus completely destroying that portion of the reservoir, notwithstanding the agreements, stipulations, conditions, and covenants mentioned. That such reduction in the size and capacity of the reservoir would, at certain stages of the water in the river, tend to reduce the supply of water at the mill of the plaintiffs in violation of their rights, is quite manifest. Secs. 2774, 2775, Stats. 1898. True, the

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plaintiffs have no property in the particles of water flowing in the stream, but only have the right to use their share of it as indicated. *Willow River Club v. Wade*, 100 Wis. 102. True, the defendant has the fee of the land in blocks 39 and 40, where most of the proposed filling is to be made, but it holds such title subject to the easements created in favor of the plaintiffs by the agreement, conveyances, and transfers mentioned. So Frank Koenig, and the plaintiffs claiming under him, had the fee of the lands above, yet he and they held such title subject to the easements created in favor of the Globe Milling Company, and those claiming under it, to draw water from the dam through the head gate, upper race, and flume. Such right to draw water from the pond and to flow lands could certainly be created by the written instruments mentioned. *Noonan v. Orton*, 4 Wis. 335; *Spensley v. Valentine*, 34 Wis. 154; *Sabine v. Johnson*, 35 Wis. 185.

But counsel contends that the plaintiffs have an adequate remedy at law, and hence that the demurrer should be sustained. We are clearly of the opinion that the plaintiffs have no adequate remedy at law. In so far as the preservation of the reservoir for holding water is beneficial to the running of their mill, the plaintiffs have the right to maintain the same according to the agreements, stipulations, conditions, and covenants mentioned. The injury complained of goes to the impairment of the use of the property belonging to the plaintiffs. The right to an injunction in such a case is supported by numerous authorities. *Pettigrew v. Evansville*, 25 Wis. 223; *Wilson v. Mineral Point*, 39 Wis. 160; *Lawson v. Menasha W. W. Co.* 59 Wis. 393; *Fox River F. & P. Co. v. Kelley*, 70 Wis. 287; *Patten P. Co. v. Kaukauna W. P. Co.* 70 Wis. 659; *Kimberly & Clark Co. v. Hewitt*, 75 Wis. 371. It is not the case of a mere breach of contract or private trespass.

*By the Court.*— The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

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BARTON, Receiver, Respondent, vs. TWOHY MERCANTILE COMPANY, Appellant.

*October 20 — November 7, 1899.*

*Appeal: Return: Judgment roll.*

The supreme court cannot entertain an appeal from a judgment unless a judgment roll made up in substantial compliance with sec. 2898, Stats. 1898, has been transmitted thereto as required by sec. 3050.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Appeal dismissed.*

For the appellant the cause was submitted on the brief of *Ross, Dwyer & Hanitch.*

For the respondent there was a brief by *Reed & Reed*, and oral argument by *Myron Reed.*

MARSHALL, J. The appeal purports to be from a judgment. The only error assigned is that the findings are contrary to the evidence. The return on the appeal contains what purports to be a proposed bill of exceptions, a bunch of papers prepared for a completed bill of exceptions ready for the trial judge's certificate, findings of fact and conclusions of law, the notice of appeal, bond on appeal, and a certificate of the clerk of the trial court that such papers are all the papers on file in the action, and that they are transmitted pursuant to the notice of appeal.

Sec. 3050, Stats. 1898, provides that on appeal from a judgment the clerk of the trial court shall transmit to the supreme court the judgment roll. The pleadings and a copy of the judgment are necessary parts of the judgment roll. Sec. 2898. Nothing approaching the requirements of a judgment roll has been transmitted to this court on this appeal, and it clearly appears by the clerk's certificate that there has never been one made up and filed in the trial court. Without a proper return in compliance with sec. 3050, this

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court cannot entertain an appeal. *Sayles v. Gudath*, 9 Wis. 159; *Wheeler v. Scott*, 3 Wis. 362; *Blodget v. Hatfield*, 5 Wis. 77; *Kellogg v. Smith*, 10 Wis. 135; *Shewey v. Manning*, 14 Wis. 448; *Hoffman & B. Mfg. Co. v. Burdick*, 95 Wis. 342.

It follows that this appeal must be dismissed.

*By the Court.*—So ordered.

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BUTLER, Appellant, vs. GILLIS and others, Respondents.

*October 20 — November 7, 1899.*

*Appeal: Bill of exceptions: Logs and timber: Liens: Levy.*

1. In the absence of a bill of exceptions, or of a certificate that the bill contains all the evidence, the only question, where the trial was by the court, is whether the pleadings and findings sustain the judgment.
2. The proofs and papers used on a motion which resulted in a judgment are not a part of the record on appeal from the judgment, unless made so by a bill of exceptions.
3. *It would seem* that, in cases coming squarely within the provisions of ch. 378, Laws of 1889 (relating to levy upon marked logs), the levy must be made in conformity with that act.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *J. A. Murphy* and *O. P. M. Jamison*, and oral argument by *Myron Reed.*

For the respondents there was a brief by *S. L. Perrin*, attorney, and *Clapp & Macartney*, of counsel, and oral argument by *Mr. N. H. Clapp* and *Mr. Perrin.*

BARDEEN, J. The plaintiff brought this action in the municipal court of Douglas county to foreclose a lien upon certain marked logs described in the papers. *The Musser-Sauntry Land, Logging & Manufacturing Company* was made

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a nominal defendant, but no service on it was obtained. Judgment was entered against the defendants *Gillis* for the amount of the debt claimed, and the same was declared to be a lien upon the logs mentioned. After the logs had been advertised for sale under the execution, the company made affidavit of ownership and of the invalidity of the lien, gave the proper undertaking, and took an appeal to the superior court. The company made a motion, based upon the papers in the case and the certificate of the lumber inspector, for a judgment reversing the judgment of the municipal court so far as it adjudged the amount due plaintiff a lien upon their logs. An affidavit of prejudice of the judge of the superior court was filed, and the case was removed to the circuit court. The motion aforesaid came on for a hearing in the circuit court, and a judgment was entered reversing the former judgment in so far as it adjudged the amount due the plaintiff to be a lien upon the logs mentioned, and dismissing the complaint as against the moving defendant, and for costs. The judgment recited that certain affidavits were read in opposition to the motion, but failed to identify them. No bill of exceptions was settled. The plaintiff appeals, and the clerk certifies to this court all of the original papers on file in his office in said action.

In cases where there is no bill of exceptions, or where the bill is not certified to contain all the testimony, this court is bound to assume that every fact essential to sustain the judgment rendered was proved on the trial. *Lee v. Campbell*, 77 Wis. 340; *Disotell v. Henry Luther Co.* 90 Wis. 635; *Conatty v. Milwaukee E. R. & L. Co.* 100 Wis. 467. In such cases, where the trial was before the court, the only question is whether the pleadings and findings sustain the judgment. *Hussa v. Sikorski*, 101 Wis. 131. The record returned to this court discloses a judgment in favor of plaintiff in municipal court for the amount claimed, which was adjudged to be a lien upon the logs described, an appeal in

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due form to the superior court, a proper transfer of the case to the circuit court, a motion upon the hearing of which certain papers and affidavits were used, and a judgment for defendant as stated. The proofs and papers used on the motion which resulted in the judgment are no part of the record proper, unless made so by a bill of exceptions. Hence, under the rule mentioned, we are bound to assume that there was sufficient before the court to authorize the judgment rendered. See *Donkle v. Milem*, 88 Wis. 33; *Keller v. Gilman*, 96 Wis. 445; *McCormick v. Cleveland*, 98 Wis. 522.

While not deciding the question, it may not be improper to say that this court inclines to the opinion that the levy upon marked logs, in cases shown to be squarely within the provisions of ch. 378, Laws of 1889, with the conditions present required by the somewhat uncertain conditions of that act, must be made in conformity therewith.

*By the Court.*—The judgment of the circuit court is affirmed.

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MANDELERT, Respondent, vs. THE SUPERIOR CONSOLIDATED LAND COMPANY and others, imp., Appellants.

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*October 20 — November 7, 1899.*

*Appealable order: Demurrer* ore tenus.

A demurrer *ore tenus* is not a demurrer within the meaning of subd. 3, sec. 3069, Stats. 1898, which authorizes an appeal from an order which "sustains or overrules a demurrer;" and an appeal cannot be taken from a ruling sustaining a demurrer *ore tenus*, even though such ruling be embodied in a written order.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Appeal dismissed.*

For the appellants there was a brief by *A. L. Sanborn*, attorney, and *Catlin, Butler & Lyons*, of counsel, and oral argument by *L. K. Luse* and *F. C. Ellis*.

For the respondent there was a brief by *Thorson & De La Motte*, and oral argument by *J. De La Motte*.

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CASSODAY, C. J. It appears from the record, in effect, that March 12, 1897, the state and Douglas county executed and delivered to one John Powell, assignee of R. D. Carvill, who was the assignee of Douglas county, a tax deed, issued upon the sale of 1893 in the required form, of the lands described, and the same was on that day recorded; that October 9, 1897, John Powell, the grantee in such tax deed, duly conveyed such lands to the plaintiff by deed duly executed and recorded; that subsequently, and in July, 1898, the plaintiff commenced this action under secs. 1197–1210, Stats. 1898, to bar the original owners of such lands and those claiming under them; that September 15, 1898, the defendant corporation and its receivers answered; that thereafter the cause came on for trial, and after the plaintiff had proved the matters and things alleged in his complaint and rested, the defendants who so answered offered to prove the allegations of their answer to the effect that Douglas county never assigned nor parted with the title to the tax certificates upon which the tax deed was issued,—being the sale for nonpayment of taxes for 1893, and that ever since such sale the county had been, and still was, the owner of such tax certificates. To the offer of such evidence by the appellants the plaintiff objected "for the reason that no deposit, as required by section 1200 of the Revised Statutes of Wisconsin, had been made, and that the answer did not state facts sufficient to constitute a defense," which objection was sustained by the court, and a written order embodying such ruling to the effect "that the demurrer *ore tenus* of the plaintiff to the answer of the defendant" was sustained, with leave to answer on payment of costs. From that order the defendant corporation and its receivers bring this appeal.

We refrain from determining the question presented upon the merits. It is not brought before us for review by the so-called "appeal" from the ruling of the court in sustaining the objection to the evidence offered on the part of the ap-

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pellants. True, such ruling was embodied in a written order as indicated, but the same might be done as to every ruling upon a trial. The question is whether an appeal can be taken to this court from such ruling when embodied in such written order. The statutes contemplate that all pleadings shall be in writing. Whether a demurrer is made to a complaint or an answer, it must be served within twenty days after the service of the pleading to which it is responsive. Secs. 2648, 2658, Stats. 1898. Such demurrer, to be effectual, must state the grounds upon which it is based. Secs. 2649, 2658, 2659, Stats. 1898. Such ruling upon an objection to evidence, although for convenience it is called a demurrer *ore tenus*, is not a demurrer within the meaning of the statutes; certainly not within the meaning of subd. 3, sec. 3069, Stats. 1898, which authorizes an appeal from an order which "sustains or overrules a demurrer." *Smith v. Kibling*, 97 Wis. 207, 208. In that case our late Brother NEWMAN in effect said that no appeal is allowed from such a ruling, and that the only way such ruling could be reviewed by this court was on an appeal from the judgment. Manifestly, the order is not appealable under any subdivision of sec. 3069, Stats. 1898.

*By the Court.*— The appeal is dismissed.

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TOWN OF SPOONER, Respondent, vs. TOWN OF MINONG, Appellant.

*October 20 — November 7, 1899.*

*Towns: Division: Validity of ordinance of county board: Apportionment of debts: Liability of new town to old.*

1. Under the provisions of sec. 674, S. & B. Ann. Stats., if an ordinance of the county board dividing a town has not been vacated by a court of competent jurisdiction, its validity cannot be called in

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question, after the expiration of two years from its date, on the ground either that it was not published as required by said sec. 674, or that the consent of the commissioners of public lands was not obtained as required by sec. 258e.

2. Under secs. 672, 960g, S. & B. Ann. Stats., when a new town was created from part of a town already existing and the indebtedness of the old town was apportioned, the two towns did not become joint debtors, but the old town remained legally liable for the whole debt, and the new town became liable to the old town for its share; and payment of the whole debt by the old town was not a condition precedent to the recovery of such share from the new town.

APPEAL from an order of the circuit court for Washburn county: A. J. VINJE, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *Arnold & Arnold.*

For the respondent there was a brief by *Mead & Hoar*, and oral argument by *L. H. Mead.*

WINSLOW, J. The complaint alleges that the board of supervisors of Washburn county by resolution created the town of *Minong*, September 12, 1893, detaching certain territory from the town of *Spooner* for that purpose, and in such ordinance declared that the portion of the then existing indebtedness of the town of *Spooner* which was chargeable to the detached territory was $691.67, which was thereby charged against the town of *Minong;* that said new town of *Minong* was duly organized by the election of town officers on the first Tuesday of April, 1894, and has ever since maintained its organization, electing town officers each year, and being represented upon the county board of Washburn county; that the town board of *Minong* levied a tax upon the town to pay said sum of $691.67 in December, 1894, and that said tax was duly collected and is in the treasury of said town; that demand has been made for the payment of said sum, but it has been refused; that the plaintiff, on the 15th of March, 1898, filed its claim for said sum with the

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clerk of the defendant town, but the town board has failed to audit the same; and that this action is prosecuted by direction of the electors of the town of *Spooner* by virtue of a resolution passed at the annual town meeting held April 5, 1898.

A general demurrer to this complaint was overruled, and we think properly. By sec. 670, S. & B. Ann. Stats., it was provided that county boards should have the power "to set off, organize, vacate, and change the boundaries of towns in their respective counties," and by sec. 672 of the same statute it was provided that "whenever the county board shall form a new town from parts of a town or towns already organized, they shall by their ordinance of division determine what portion of the indebtedness then legally incurred by such old towns shall be chargeable to the respective portions so detached to form such new town; and such new town shall pay the proportion of such indebtedness so declared chargeable to such detached portions at such time as the same shall become payable; and for that purpose the town board of such new town shall levy a tax," etc. It has already been held by this court that these sections are valid. *La Pointe v. O'Malley*, 47 Wis. 332. By sec. 960*g*, S. & B. Ann. Stats., the sum apportioned is made payable directly to the original town.

But it is objected that the complaint does not show that the ordinance of the division was published as provided by sec. 674, S. & B. Ann. Stats. A complete answer to this contention is found in the last-named section, which provides that the validity of any such ordinance as the present may be tested by *certiorari* or other proper proceedings brought directly for that purpose by a proper officer or taxpayer of such new town within two years from the date of such ordinance, and that the same shall not be called in question in any other action or proceeding except in a case wherein such ordinance shall have been vacated by a court of competent

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jurisdiction.[1] It appears from the complaint that the two years limited by the statute have long since elapsed, and it does not appear that any court has vacated the ordinance of division; hence, upon the facts stated in the complaint, it is no longer the subject of attack. *Schriber v. Langlade*, 66 Wis. 616.

The complaint alleges that the indebtedness of the town of *Spooner* was owing to the state, and upon this statement another contention is made by the appellant. It is contended that, inasmuch as sec. 258*e*, S. & B. Ann. Stats., provided that the boundaries of any municipality which has obtained a loan from the trust funds of the state shall not be altered so as to cut off any territory without the consent of the commissioners of public lands, and on such terms as they prescribe, hence the ordinance of division in question was void, because no such consent is alleged. This objection is also answered by the provisions of sec. 674, above referred to. If such consent was not obtained, and if the ordinance was rendered invalid by reason thereof, still the question could only be raised in the manner provided in that section.

It is suggested that the two towns became joint debtors, and that the original town cannot recover of the new town until it has paid the entire debt. This is clearly untenable. The old town remained legally liable for the whole debt, on familiar principles, and could be sued alone therefor; and the new town became liable to *the old town* for its share of such debt by virtue of the statute.

It appearing by the complaint that the money has been already raised for the specific purpose of paying the same to the plaintiff, and is in the hands of the treasurer of the defendant town, and that the question of the validity of the ordinance is foreclosed, there would seem to be no doubt that the complaint states a good cause of action.

*By the Court.*— Order affirmed.

[1] This provision is now found in sec. 671, Stats. 1898.— REP.

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DOUGLAS COUNTY AGRICULTURAL SOCIETY, Appellant, vs. DOUGLAS COUNTY, Respondent.

*October 20—November 7, 1899.*

*Taxation: Exemption: Land leased for fair grounds.*

1. Statutes exempting property from taxation, if open to construction, should be construed strictly against the exemption.
2. Subd. 4, sec. 1038, Stats. 1898 (exempting from taxation lands "owned" and used by any county agricultural society exclusively for fair grounds), and subd. 17 (exempting "property of" any industrial or agricultural fair corporation, used exclusively for such exhibitions, not exceeding eighty acres of land), were not intended to exempt from taxation mere leased lands.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

Action to quiet title. The complaint states, in substance, that plaintiff is a county agricultural society duly incorporated under the laws of this state, and as such is and has been since January 1, 1894, in possession of certain lands described, using the same exclusively for fair grounds under a lease for that purpose from the owner, expiring January 1, 1899, requiring an annual payment of one dollar and the taxes assessed on the lands to the owner as rent; that during each of such years taxes have been assessed on the property; that plaintiff has not paid the same, and that such proceedings have been taken under the statutes governing such matters that a tax certificate is outstanding, issued by the county treasurer of Douglas county, Wisconsin, on a sale of the lands for delinquent taxes for each such year, upon which certificates deeds will be taken unless the court intervenes and prevents it; that the defendant claims some interest in the lands by reason of the tax liens. The prayer for judgment is that the taxes be declared void and the title of plaintiff in or to the lands be quieted as against the defendant.

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The defendant demurred to the complaint for want of facts sufficient to state a cause of action. The demurrer was sustained and plaintiff appealed.

For the appellant there were briefs by *Reed & Reed*, and oral argument by *Myron Reed*.

For the respondent there was a brief by *Isaac Ross*, district attorney, and *W. M. Steele* and *M. S. Bright*, of counsel, and oral argument by *Mr. Steele*. To the point that lands held under a lease are not the "property of" or "owned by" the fair association, they cited *Ohio & M. R. Co. v. Barker*, 125 Ill. 303; *Montgomery v. Wyman*, 130 Ill. 17; 25 Am. & Eng. Ency. of Law, 165, and cases in note; *Hennepin Co. v. Bell*, 43 Minn. 344; *Travelers' Ins. Co. v. Kent*, 151 Ind. 349; *Armand v. Dumas*, 28 La. Ann. 403; *Laurent v. Muscatine*, 59 Iowa, 404; *Kittanning Academy v. Kittanning*, 8 Pa. Super. Ct. 27; *Gray v. La Fayette Co.* 65 Wis. 567; *Katzer v. Milwaukee*, 104 Wis. 16; *Black v. Brooklyn*, 51 Hun, 581.

MARSHALL, J. This action was instituted on the theory that plaintiff's lease did not obligate it to pay any sum on account of taxes, except such as might be lawfully assessed on the leased premises, and that the property was not liable to taxation while occupied and used by plaintiff, because subd. 4, sec. 1038, Stats. 1898, exempts from taxation lands owned and used by any county agricultural society exclusively for fair grounds, and subd. 17 of the same section exempts from taxation land of such a corporation used exclusively for agricultural and industrial fairs and exhibitions, not exceeding eighty acres.

The question turns on the meaning of the word "owner" and the words "property of" used in the exemption statutes referred to. That is ruled by the recent decision of this court in *Katzer v Milwaukee*, *ante*, p. 16. The question there involved the meaning of the word "owner" in subd. 3 of the

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same section, exempting from taxation "real property *owned* by any religious association, necessary for the location and convenience of the buildings of such association and embracing the same, used exclusively for the purposes of such association." The words under consideration here were used in the same sense precisely as the similar expression in subd. 3. That is evident. The court held in the *Katzer Case* that the word "owner" must be deemed to have been used in its ordinary sense, calling for proprietorship of the title to the property, not a mere right or privilege to use it. True, such word has often been construed so as to be satisfied by less than possession of the legal title. Such lesser significance is doubtless within its reasonable meaning, and may be adopted in a proper case; but in a tax exemption statute words cannot be bent from their ordinary meaning to favor the exemption, in the absence of a legislative intent, clearly manifest, pointing that way. The universal rule is, as stated in the *Katzer Case*, that a statute conferring special privileges in respect to taxation, which is open to construction, should be read most favorably against the privilege. The application of that rule to the complaint here leaves no room for doubt but that the statute relied on by appellant was not intended to exempt from taxation mere leased lands. That was the decision of the trial court. It must be affirmed.

*By the Court.*— So ordered.

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# ENDION IMPROVEMENT COMPANY, Respondent, vs. EVENING TELEGRAM COMPANY, imp., Appellant.

# SAME, Respondent, vs. CITIZEN PUBLISHING COMPANY, imp., Appellant.

*October 20 — November 7, 1899.*

*Elections: Publication of notices: Compensation: County clerk: Authority to make contract: County board: Compromise of claim: Notice of statutory requirements.*

1. Sec. 21, Stats. 1898 (which changed the law relating to the publication of general election notices by county clerks), controlled the publication of such notices only as were transmitted to the clerks after said statutes went into effect, September 1, 1898, even though the election was to be held after that date.
2. Sec. 21, Stats. 1898, requires the county clerk to publish as therein specified so much of the general election notice received by him from the secretary of state as relates to the questions and officers to be voted for in his county. Sec. 58 provides that when a proposed constitutional amendment or other question is to be submitted to the people, the secretary of state shall, not less than fifteen days before the election, certify the same to each county clerk, and the same shall be included in the publication of nominations for office provided for in sec. 36. *Held*, that the specific provision of sec. 58 governs and controls the more general provision of sec. 21, and should have been followed in the publication of notice of the submission of a proposed revision of the banking law, although a copy of such proposed revision was transmitted to the county clerk with the general election notice.
3. Sec. 9, ch. 288, Laws of 1893, required the secretary of state to publish the general election notice in a newspaper at the seat of government once a week from the date thereof until the election. Sec. 10 required the county clerk to cause the substance of such notice "to be published in at least one newspaper in the county," but made no mention of the number of insertions, the former express provision for a weekly publication (sec. 18, R. S. 1878) having been superseded upon the adoption of the Australian ballot system. *Held*, that but one insertion of the notice required by sec. 10 was authorized.
4. A county clerk has no authority to cause or contract for any publication of election notices except such as the law prescribes, and

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persons with whom he contracts for such publication are bound to take notice of said limitation.

5. The fees for each publication of election notices being prescribed by law, the county board of supervisors has no power to compromise a claim for such publication, or to allow any sum in excess of the amount legally due.

6. Where a daily newspaper accepts for publication the information to voters it is chargeable with notice that a daily publication is required by sec. 36, Stats. 1898, in counties wherein such a newspaper is published, and if it fails to comply therewith it is not entitled to any compensation.

APPEALS from orders of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

The plaintiff brings these actions on behalf of itself and other taxpayers against Douglas county, its clerk and treasurer, and the other defendants, to restrain the issue and payment of certain county orders mentioned in the pleadings. It is alleged in the first of said cases, in substance, that the secretary of state, in accordance with sec. 9, ch. 288, Laws of 1893, transmitted to the county clerk a notice in writing specifying the officers to be voted for at the ensuing November election; that the clerk caused a proper notice to be published in the Evening Telegram, which is a daily newspaper, as required by sec. 10 of said law; that said notice contained seven folios, and the legal fees for publication were $4.20; that said notice was published according to law on August 13, 1898; that on November 11, 1898, said company filed a bill with the county clerk for publishing said notice, thirteen publications, 200 folios, $960; that said company falsely and fraudulently pretended and claimed that said notice contained 200 folios and that the legal fees for publishing the same were $960; that the same was presented to the county board, and allowed at $636.35, and the clerk was directed to issue an order therefor. Then followed proper allegations that the clerk threatens to issue, and the treasurer to pay, said order. For a



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second cause of action it is alleged that the county clerk prepared and caused to be delivered to the defendant newspaper an election notice and information to voters, as directed by secs. 36, 37, Stats. 1898; that said newspaper published said notice on October 31 and November 7, 1898, and no more; that a claim for $240 therefor was presented to the county board and allowed, and an order was issued and delivered to said defendant; that said claim was fraudulent, because said newspaper did not publish said notice daily, as provided by law; and that the treasurer threatened to pay said order. In the second case the defendant the *Citizen Publishing Company* was the proprietor of a weekly newspaper, and printed the notice mentioned in the first cause of action above, and presented a claim the same as in the other case, and upon which the action of the county was the same. The relief demanded in both cases was that the claims be declared void, and the county officers be restrained from issuing or paying said orders.

The answer of the *Telegram Company* admits the publication of the notice mentioned in the first cause of action, and the presentation and allowance of the claim as stated, denies fraud, and alleges that the notice contained 200 folios. It further alleges that it entered into a contract with the county to publish a notice of the general election, setting out the contents of the notice at length, and also expressly contracted to, and did, publish ch. 303, Laws of 1897, entitled "An act to revise the laws authorizing the business of banking;" that said notice and banking law were published thirteen weeks, and contained 200 folios. It further sets out a presentation of its claim for the amount specified, and an allowance and compromise of the same by the county board, with defendant's consent, at the sum mentioned. A general denial was entered to the second cause of action, after an admission of the publication of the notice. The answer in the second case sets out substantially the same defense as in the other case.

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An order to show cause why a preliminary injunction should not issue was obtained, and upon the hearing such an injunction was issued, from which orders the defendants have appealed.

For the appellant *Evening Telegram Company* there was a brief by *Solon L. Perrin;* for the appellant *Citizen Publishing Company* there was a brief by *W. M. Steele;* and the cause was argued orally by *Mr. Perrin.*

For the respondent there was a brief by *Crownhart & Foley*, and oral argument by *C. H. Crownhart* and *W. R. Foley.*

BARDEEN, J. It appears from the record that some time in August, 1898, the secretary of state transmitted to the county clerk of Douglas county the election notice as required by sec. 9, ch. 288, Laws of 1893. With that notice he also transmitted a copy of the revised banking law, known as ch. 303, Laws of 1897, which by its terms was to be submitted to the electors of the state for approval or disapproval at the November election for that year. Thereupon the county clerk made out the usual election notice, and attached thereto a copy of the banking law, and directed the defendant newspapers to publish the same weekly until election day. This was done by both of the defendant newspapers, the first publication having been made early in August. It was for the publication of this notice and of the banking law, at legal rates, that the defendants presented bills which were allowed by the county board as stated. When the bills were presented, some question seems to have been raised as to their validity. The bills were referred to a committee, and the advice of the district attorney was taken. The claims were finally reduced from $960 to $636.35. The plaintiff insisted that the proper election notice, and the only notice the defendants had any right to publish, and the only one the county clerk had any right to contract

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with them to publish, contained but seven folios, and that there was no authority of law for publication of the notice more than once. When the notices were transmitted to and received by the county clerk, and when he attempted to make the contract set up in the answer, the law in force was sec. 10, ch. 288, Laws of 1893, and provided that, after the clerk had received such notice from the secretary of state, he should "forthwith cause a notice containing the substance of the notice so received by him, together with a statement of the several county officers that are to be elected, to be published in at least one newspaper in the county." The Wisconsin Statutes of 1898 were to go into effect on September 1st of that year. Sec. 10 had been carried forward into the revision as sec. 21, and had been amended by adding after the words "received by him," above quoted, the words "as relates to the questions and officers to be voted for in his county." This law was supposed to have a sort of retroactive effect. So the county clerk not only gave to the newspapers the usual election notice, but also the entire banking law, as a question to be voted upon, and directed the publication of both until the day of election. In this he acted entirely without authority. Sec. 9, ch. 288, required the secretary of state to transmit the election notice to the county clerk "between the first day of July and the first day of September" in each year in which state officers were to be elected. Thus, the law required such certification to be made before the Statutes of 1898 went into effect. At the time the notice was received by the clerk, he was only required to print the substance of the notice received by him as to the election of officers. Sec. 21 of the Statutes of 1898 had no controlling force, and could only apply to such notices and questions as were transmitted to the clerk after they went into effect. If this were not so, the fact that there were specific provisions of the statute as to the manner in which constitutional

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amendments or other questions were to be published and gotten before the electors must control the action of the county clerk in that regard. Sec. 50, ch. 288, Laws of 1893, amended and carried into the Statutes of 1898 as sec. 58, provided that, whenever such matters were to be submitted to the people of the state, the secretary of state, not less than fifteen days before election, should certify the same to the clerk of each county, who was to include the same in the publication of the notice of nominations for office prescribed by sec. 36. This publication was required to be at least seven days before election in two newspapers, and, in counties having no daily newspapers, in two additional papers. In counties where daily newspapers are published, such publication shall be daily, and one of such publications shall be upon the last day such paper shall be issued before election. It is a familiar principle that specific provisions of statute in regard to a matter shall govern and control more general provisions, so that, if it were admitted that sec. 21 had reference to the matter in hand, the specific provisions of secs. 58 and 36 must control. Our conclusion is, therefore, that the action of the clerk in causing the publication of the banking law as he did was absolutely without authority of law, and not binding upon the county.

Another question is presented: Was publication of the election notice more than once authorized by law? The statute says such notice shall be "published in at least one newspaper published in the county." The clerk and the publishers supposed that because sec. 9 required the secretary of state to "publish a copy of such notice in a newspaper printed at the seat of government, once in each week from the date of such notice until the election to which it refers," the notice provided for in sec. 10 should be published the same length of time. Any such supposition was wholly without legal foundation. The statute makes no such requirement, and a reference to other statutory provisions

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shows that no such supposition can be considered reasonable. Prior to the adoption of the Australian ballot system, the statute contained an express requirement that such notice should be published once a week from the date of the notice until the election to which it refers. Sec. 18, R. S. 1878. As soon as the new plan was adopted this provision was dropped out of the law, and other suitable and proper statutes were passed on that subject, as is shown by secs. 26, 27, ch. 288, Laws of 1893. The propriety and necessity of any such publication were thereby done away with. The publication of the notice required by sec. 10 was simply to set the machinery of election in motion, and the other provisions noted brought the information home to the voter in such a way as to render a continuance of the first notice entirely unnecessary.

But it is said the county clerk made a *contract* with the publishers to publish the notice as they did, and therefore the county is bound. The clerk is a mere servant of the county. He has no power to bind the county, except in cases of express grant of authority, or where it may be fairly implied from the nature of the act authorized. The world at large is chargeable with notice of his legal restrictions. As stated in *Fernandez v. Winnebago Co.* 53 Wis. 247, "The liability of the county for such claim must rest upon strict legal right, and may not be enlarged by usage or other implication, or by argument of convenience." The clerk had no right to make any such contract, and no duty rested upon him to act as he did. He was not exercising any legal discretion. He stood as the mere agent of the county, with no power or authority to cause or contract for any publication except such as the law prescribed. His acts in this regard were clearly in excess of his authority, of which the defendants were bound to take notice.

Again, it is urged that the matter was compromised. The statute prescribed certain fees for each publication made according to law. The right of the publisher to compensation

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for his work does not rest upon contract, but results by operation of law. He is entitled to the fees so prescribed and no more. His right thereto cannot be increased or diminished by contract. Such is substantially the holding in *Hoffman v. Chippewa Co.* 77 Wis. 214. In that case the publisher contracted with the county clerk to publish the list of unredeemed lands for three cents per description. The law prescribed a fee of thirty cents. The list was duly published, and the plaintiff then presented his bill for the fees according to the legal rate. The answer set up the contract, but the court held that, the statute having fixed the rate of compensation, it could not be diminished by any arrangement or contract the county clerk might make in respect thereto. So in these cases the rate of compensation for the services rendered is fixed by statute. Upon that basis the defendants are entitled to be paid. There can be no compromise, because there is nothing to compromise. The county board had no right or power to squander or give away the money of the county. *Washburn Co. v. Thompson*, 99 Wis. 585; *Land, L. & L. Co. v. McIntyre*, 100 Wis. 245. In their administrative capacity, the members of the county board act and exercise their power as public or special agents, and they cannot exceed the power conferred upon them by law. They cannot bind the county by allowing and ordering a claim to be paid not legally chargeable to it. They have not unlimited choice as to the objects to which the money of the public shall be applied. *Board of Commissioners of Huntington Co. v. Heaston*, 144 Ind. 583. They are as strictly bound by the law as are the other defendants, and bound to take notice of it and act within its provisions. Hence it follows that the pretended claim of compromise has no foundation to rest upon. Any allowance of the publishers' claims beyond the limits hereinbefore named was wholly unauthorized and illegal, and their payment was properly restrained.

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The allowance in the first case of the claim of $240 for publishing information to voters was also illegal. The Evening Telegram was a daily paper. Sec. 36, Stats. 1898, required the clerk to make such publication daily in counties where daily newspapers were published. The Telegram Company received the notice, and was chargeable with knowledge of the law. The clerk had no discretion in the matter. The company having accepted the notice for publication, it then became its duty to publish it daily until election. Sec. 37 fixes the compensation for such publication in weekly newspapers at $120, and in dailies at $240. Instead of publishing the notice daily, the defendant made but two publications,— October 31st and November 7th. There having been no compliance with legal requirements, the defendant was clearly not entitled to compensation.

*By the Court.*— The orders appealed from in both cases are affirmed.

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## ROBERTSON, Appellant, vs. EDELSTEIN, Respondent.

*October 21 — November 7, 1899.*

*Slander: Local meaning of word: Pleading: Court and jury.*

1. An allegation in a complaint for slander that a word, ordinarily not slanderous, is commonly understood at the place where it was spoken as charging a crime, is merely an allegation that the word is there ambiguous and *may* have the criminal meaning; and the question whether it is capable of such meaning in the light of the whole context is for the court, whether presented upon demurrer or by proof on the trial.
2. The words, "Get out of here, you son of a bitch. I know you are nothing but a damned old bitch," spoken of a married woman, cannot reasonably be construed as charging that she was a common whore or prostitute and was guilty of the crime of adultery, even though the word "bitch" was commonly understood to mean that, at the place where the words were spoken.

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Robertson vs. Edelstein.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

Appeal from judgment for defendant entered upon sustaining a demurrer *ore tenus* to the complaint, which alleges that the defendant, at the city of Superior, on May 14, 1898, in the presence of others, maliciously uttered of the plaintiff the words: "Get out of here, you son of a bitch. I know you are nothing but a damned old bitch,"—and meant thereby that the plaintiff was a common whore and prostitute, had been and was guilty of the crime of adultery with different men, and was addicted to promiscuous sexual intercourse. The plaintiff further alleged that the word "bitch," when spoken of a woman in said city of Superior, is commonly understood to mean a whore or prostitute, and commonly implies that the person of whom it is spoken has been and is such and is guilty of promiscuous sexual intercourse and unchaste conduct, of which the defendant had knowledge, and meant so to charge, and that the words were so understood by the hearers.

For the appellant there was a brief by *O'Brien & Vaughn*, and oral argument by *John H. Vaughn.*

For the respondent there was a brief by *Crownhart & Foley*, and oral argument by *C. H. Crownhart.*

DODGE, J. There is abundant authority, as intimated in *Clute v. Clute*, 101 Wis. 137, for the proposition that a word may have a local or cant meaning other than its general and accepted significance, and that if it be used and understood in such meaning, so that it does in fact charge the plaintiff with the commission of a crime, its use may be slander, as much as the use of a word which, in proper significance, charges such crime. This rule, however, should be cautiously applied. The law is well settled, and based on the experience and wisdom of centuries, that an action of slander ought not to be maintained for mere abuse and vilification, in the absence of actual special damage. Such is not its

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purpose, and the maintenance of such actions, therefore, would lead to a vast amount of unwise and unfortunate litigation. The law has wisely drawn the limitation, with exceptions not here material, at the point of charging a criminal offense by spoken words, and should not, by refinement, be extended beyond that point. An assertion merely of libidinous tendencies or general lewd conduct is not sufficient. *K—— v. H——*, 20 Wis. 239. Our language is full of words and expressions which are ambiguous, and which may mean one thing or another,— which may convey the idea of specific crime, but which ordinarily do not. The general and established meaning of a word is, of course, that which is to be presumed in any and all communities, and an allegation that the word has a certain peculiar and unusual meaning in certain localities can ordinarily mean no more than that it may have that meaning in addition to its proper and usual one. It imputes local ambiguity to a word otherwise single in meaning. The lexiconic significance of words of our own language is matter of judicial knowledge because of common knowledge. The allegations of this complaint, therefore, cannot be taken to mean that the word in question has been entirely transposed in its use in the city of Superior so as not to have that force which its use for centuries has given it in the English language, but merely that, in addition and under some circumstances, it has the other more specific and criminal meaning.

The particular word complained of has been many times the subject of discussion by courts, and its general and primary force and effect have been stated, as they were by this court in *K—— v. H——*, *supra*, to signify merely reproach or abuse, and not to convey a charge of any specific crime. *Schurick v. Kollman*, 50 Ind. 336; *Logan v. Logan*, 77 Ind. 558; *Claypool v. Claypool*, 56 Ill. App. 17; *Riddell v. Thayer*, 127 Mass. 490; *Craig v. Pyles* (Ky.), 39 S. W. Rep. 33; *Blake v. Smith*, 19 R. I. 476.

The effect, therefore, of the allegations by way of induce-

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ment, as to the meaning of the word in Superior, is no more than that it is there ambiguous and *may* have the criminal meaning. The meaning and significance with which it was in fact used cannot be extended beyond its ordinary and usual significance by innuendo, or an allegation of what was the meaning in fact. *Clute v. Clute*, 101 Wis. 137. It therefore must become the duty of the court, before submitting the question to the jury, to examine the language used, and ascertain whether therein the word is capable of the criminal significance, or is used with its general and customary meaning. Any word, ambiguous itself, may be rendered certain and definite by either the circumstances under which, or the other words in connection with which, it is used. *Riddell v. Thayer*, 127 Mass. 490. If an innocent meaning appears from the context or *colloquium*, it cannot be extended or diverted by the innuendo. The question, then, is not whether the word itself is capable of the slanderous meaning, but Is it so capable in the light of the whole context? To illustrate: A charge of unchastity or adultery could not exist in an assertion that a woman "is an old bitch because she quarrels with her neighbors," or "is a bad woman because she doesn't go to church." Indeed, such apparently unambiguous terms as "highwaymen, robbers, and murderers," "steal," and "thief," have been held *non*slanderous by reason of the circumstances or context in which used. *Stern v. Katz*, 38 Wis. 136; *Van Rensselaer v. Dole*, 1 Johns. Cas. 279; *Fawsett v. Clark*, 48 Md. 494; *Hall v. Adkins*, 59 Mo. 144; *Thompson v. Bernard*, 1 Campb. 48; *McGilvray v. Springett*, 68 Ill. App. 275.

If it appear that the expression as used could not naturally and reasonably be understood by people of ordinary understanding to charge the crime, it becomes the duty of the court to hold it not slanderous, whether presented on demurrer or by proof upon the trial. *Montgomery v. Deeley*, 3 Wis. 709; *Campbell v. Campbell*, 54 Wis. 90; *Bradley v.*

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*Cramer*, 59 Wis. 309; *Schild v. Legler*, 82 Wis. 73, 75; *Pandow v. Eichsted*, 90 Wis. 298; *Stroebel v. Whitney*, 31 Minn. 384; *Wing v. Wing*, 66 Me. 62; Townshend, Slander & L. §§ 133, 134.

Applying these principles, it is apparent that the phrase quoted and alleged as slander was upon its face merely abuse and reproach. The character of the plaintiff for chastity, or her guilt or innocence of the crime of adultery, does not appear to have been the subject of comment, but rather the desirability of her presence in defendant's place of business. The very epithets and profanity which pervade the sentence are of that unreasonable, inaccurate, and unmeaning character which are usually found in a verbal assault with the purpose of reproaching and insulting the person addressed, without purposing to make any specific charge, but merely to evince the exasperation and contempt of the person speaking. The whole manner and matter of the assault must, to the ordinary hearer, negative the idea that defendant meant to charge anything specific, or had any meaning or purpose other than to give vent to his own anger and to affront and hurt the feelings of the plaintiff. Exuberance of invective and meaningless epithet has often been recognized as cogent to refute a slanderous meaning in some of the words, which, if used deliberately and alone, would clearly charge crime. It evinces a heat of passion in some measure at least inconsistent with definiteness of meaning and choice of expressions. *Young v. Bridges*, 34 La. Ann. 333; *Penfold v. Westcote*, 2 Bos. & P. (N. R.), 335.

We are satisfied that, even though the word "bitch" alone may convey the idea of adulteress, or one given to promiscuous unchastity, the language alleged is not reasonably capable of the defamatory meaning ascribed to it by the innuendo, and could not in customary acceptation have been understood as charging the plaintiff with the crime of adultery by ordinary hearers having no more knowledge of the ap-

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plication of that language than is furnished to the court by the inducement and *colloquium* set forth in the complaint. The exclusion of all evidence and judgment of dismissal for want thereof were therefore proper.

*By the Court.*— Judgment affirmed.

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SOUTHWESTERN LAND COMPANY, Appellant, vs. ELLIS, interpleaded, Respondent.

*October 21 — November 7, 1899.*

***Garnishment: Moneys deposited pursuant to stipulation on compromise: Collateral issues: Assignment.***

1. Upon a compromise of the differences between S. and H., some of which were in suit, a sum of money was, pursuant to a stipulation, deposited by H. with his attorneys to be by them paid to S.'s attorney, E., upon compliance by E. with certain conditions, one of which was the satisfaction of a real-estate mortgage held by plaintiff herein against S. After all the conditions had been complied with, but before the money had been paid over to E., the plaintiff garnished H.'s attorneys for the purpose of subjecting the money to the payment of a claim against S. The garnishees paid the money into court, and E., being interpleaded as defendant, claimed the money as his own by virtue of an attorney's lien thereon for services and expenses and by virtue of an assignment from S. It appeared that the value of E.'s services, together with his disbursements and the amount advanced by him for the satisfaction of the mortgage mentioned, exceeded the sum in question. *Held*, that the money was not subject to garnishment as the property of S., and that the trial court properly ordered it to be paid over to E.
2. The plaintiff could not, in such garnishment proceedings, litigate a claim against E. for false representations in procuring the satisfaction of the mortgage, or a claim for damages for breach of contract in performing services for it in the suit of S. against H.; nor could it question E.'s right to the money in the garnishees' hands on the ground that it belonged to his assignee for the benefit of creditors.
3. A written assignment from S. to E. of the proceeds of the litigation and settlement between S. and H. did not confer upon E. any rights

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in addition to those secured under the stipulation, but was merely an acknowledgment of those rights; and it is immaterial, therefore, that such assignment was not executed until after the garnishment.

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Wickham & Farr*, and oral argument by *James Wickham.*

For the respondent there was a brief by *J. F. Ellis*, attorney *in pro. per.*, and *W. F. Bailey*, of counsel, and oral argument by *Mr. Bailey.*

CASSODAY, C. J. This action was commenced against the defendant M. Swihart on or about June 25, 1897, to recover $601.30 and interest due upon a promissory note, upon which judgment was subsequently recovered for $654.88 damages and costs. At or about the time of its commencement a garnishee summons therein was served upon the respective members of the law firm of Jenkins & Jenkins. That firm, as such garnishees, answered to the effect that they were not in any manner nor upon any account indebted or under liability to Swihart, and did not have in their possession or under their control any real estate, nor any personal property, effects, or credits of any description whatever, belonging to Swihart, or in which he had any interest, and were in no manner liable as garnishees in this action, except as they might be held liable upon the following facts, to wit:

On April 30, 1897, an action which had been commenced in November, 1893, was still pending in the circuit court for Chippewa county, in which Mr. Swihart was plaintiff and U. A. Harless and several others were defendants, and in which the defendant *Ellis* was the attorney for Swihart, and the garnishees, Jenkins & Jenkins, were attorneys for Harless and others. On April 30, 1897, the parties to that action, through their attorneys, agreed to settle the same,

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and accordingly entered into a stipulation to the effect that — whereas all the material facts in the action were at issue and all the claims made by the plaintiff therein were denied by the defendants, and whereas the parties thereto had other matters of dispute and differences between them, involving the right by the plaintiff to the timber on the lands described, as well as a judgment for deficiency against Swihart on the foreclosure of a certain mortgage and other matters of difference between them which should be settled and compromised, and the defendants who had appeared therein were willing to pay in compromising, settling, discharging, and satisfying such differences and disputes, and upon the delivery of the releases, satisfaction, deeds, and discharges therein mentioned, the sum of $800 to settle and compromise the same — U. A. Harless and S. P. Grindle should become the owners of the lands described in accordance with the patent issued to them by the state, and were entitled to a decree of the court affirming their title; that the taxes for the years 1894 and 1895 theretofore paid by Swihart thereon, amounting to $47.30, be paid back to him out of the $800; that the balance thereof, to wit, $752.70, be paid to Swihart's attorney, *J. F. Ellis*, upon the delivery of a proper release or satisfaction releasing the lands described from a certain mortgage given by Swihart and wife to the *Southwestern Land Company*, June 12, 1894, and recorded, and the delivery of the deeds, tax receipts for the taxes for 1894 and 1895, and the discharges therein mentioned; that the claim of Swihart to all the timber on the lands described be, and the same was thereby, released, satisfied, and discharged; that the judgment for the deficiency on the foreclosure in favor of Harless and Grindle against Swihart, dated March 5, 1896, for $103.40, be satisfied and discharged of record; that Swihart and wife should execute and deliver to U. A. Harless and S. P. Grindle a quitclaim deed in due form to certain lands therein described; that the

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claims for damages by either party against the other be, and the same were thereby, satisfied and settled in full; that all claims for damages made by Swihart therein against U. A. Harless and others, or any of them, for and on account of the matters and things alleged in the complaint therein be, and the same were thereby, satisfied and discharged; and that the decree provided for by such stipulation to be entered therein should be without costs to either party.

Said answer further stated that May 15, 1897, U. A. Harless deposited with Jenkins & Jenkins $752.70, to be paid to *J. F. Ellis* upon the delivery of a proper release or satisfaction of the *Southwestern Land Company* of the mortgage mentioned in such stipulation, and the delivery of the deeds, releases, tax receipts, etc., mentioned therein; that such tax receipts were delivered to U. A. Harless May 15, 1897; that the quitclaim deed mentioned was delivered to Jenkins & Jenkins, for U. A. Harless, May 15, 1897, and the satisfaction of the mortgage mentioned was sent by *J. F. Ellis* to Jenkins & Jenkins by mail from Eau Claire June 22, 1897, and was returned by Jenkins & Jenkins to *J. F. Ellis* June 23, 1897, with a letter from them calling his attention to a mistake in such satisfaction and inclosing a blank satisfaction of such mortgage to be executed by the *Southwestern Land Company;* that at the time of such service of the garnishee summons herein Jenkins & Jenkins had not received such satisfaction, or any other satisfaction, of that mortgage; that *J. F. Ellis* claims the $752.70 under and by the terms of the stipulation, and notified Jenkins & Jenkins that he had the satisfaction of the mortgage which Jenkins & Jenkins had prepared, and sent to him June 23, 1897, properly executed and ready to be delivered upon payment of the amount named; that the postoffice address of *J. F. Ellis* was and is Eau Claire; that May 15, 1897, Jenkins & Jenkins gave to *J. F. Ellis* a memorandum on the foot of

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such stipulation to the effect that May 15, 1897, U. A. Harless had deposited with them the $752.70 to be paid to *J. F. Ellis* pursuant to the stipulation upon the delivery of a proper release or satisfaction of the mortgage mentioned, and the delivery of the deeds, releases, tax receipts, etc., mentioned therein; that the garnishees, being in doubt respecting their liability as such garnishees therein, set forth all the facts and circumstances respecting the same, and submitted to the court the question of their liability as garnishees in this action.

On August 31, 1897, C. L. Allen, attorney for the plaintiff in this action, made an affidavit stating, in substance, the commencement of the action; that the garnishees had answered, giving copies of such answers; that the $752.70 in the hands of Jenkins & Jenkins was claimed by *J. F. Ellis*, stating his name and residence and the nature of his claim as made by him,—asking that *Ellis* be interpleaded in the garnishee action in the place of Jenkins & Jenkins. On September 9, 1897, on such affidavit of Allen, and such answer of the garnishees, and the records in the action, the court ordered *J. F. Ellis* to be interpleaded in the garnishee action; that he be served with a copy of the order, a notice of interpleader; and that the garnishees, Jenkins & Jenkins, pay to the clerk of the court $752.70, being the moneys in their hands, and be discharged from liability. Notice of such interpleader was duly served upon *J. F. Ellis*, as required by such order, together with the copy of the order, and due proof thereof made. *J. F. Ellis* thereupon answered at great length, and to the effect that he claimed the $752.70 by virtue of having an attorney's lien thereon for services and expenses rendered in the action of *Swihart v. Harless and others*, and by virtue of an assignment from Swihart to him made April 30, 1897, and also that he had advanced for Swihart $350, which was paid to the plaintiff before this garnishment was commenced, for the purpose of



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releasing the mortgage and judgment mentioned, and which plaintiff held against Swihart.

Upon the trial of the issues formed by such answer of *Ellis* and the affidavit for garnishment the court found as matters of fact, in effect, that between November 23, 1893, and April 30, 1897, *Ellis* performed legal services in behalf of Swihart as his attorney in certain actions brought by Swihart against U. A. Harless and others, which were of the reasonable value of $350; that he also incurred and expended in behalf of Swihart for disbursements in such action between such dates $105.41; that April 30, 1897, a compromise settlement of the matters in dispute in such actions between Swihart and Harless and others was effected, whereby Harless and others agreed to pay to Swihart $800 in settlement thereof as per the written stipulation mentioned; that Swihart retained $47.30 of that amount to repay him for what he had expended for taxes as mentioned; that thereupon Harless and others paid to and deposited with Jenkins & Jenkins $752.70, to be paid to *J. F. Ellis*, according to the terms of the stipulation, upon the execution and delivery of a proper release and satisfaction of the mortgage mentioned; that in concluding the terms of the settlement, on April 30, 1897, for a valuable consideration, by an instrument in writing, Swihart duly transferred, assigned, and set over unto *J. F. Ellis* the $752.70 so deposited with Jenkins & Jenkins, subject to the terms and conditions of the stipulation mentioned; that all the terms and conditions of the stipulation to be performed by *Ellis* were by him performed, and that he paid to the *Southwestern Land Company* in payment and satisfaction of the mortgage mentioned, and for the satisfaction and release thereof, $350, June 22, 1897; that he duly tendered a release of that mortgage to Jenkins & Jenkins, and demanded the $752.70 shortly after the institution of the garnishee proceedings against Jenkins & Jenkins; that the value of the services rendered by *Ellis*, together

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with the sums incurred and expended by him as disbursements in the actions mentioned, together with the sums paid by him to the *Southwestern Land Company* for a release and satisfaction of the mortgage referred to, exceed in amount the sum so deposited with Jenkins & Jenkins, or either of such firm; and that no part of that sum has been paid to *Ellis*.

And as conclusions of law the court found, in effect, that the interpleaded defendant, *Ellis*, was entitled to the money paid to the clerk of the court in the garnishment proceedings, being $752.70, and to judgment for the payment thereof to him, and for his costs, not exceeding $25, and also his disbursements therein against the plaintiff, the *Southwestern Land Company;* and ordered judgment to be entered accordingly.

From the judgment so entered the plaintiff appeals.

In the suit of *Swihart v. Harless and others* nothing was conceded to be due. On the contrary, all material allegations of the complaint were put in issue by the answer. The $800 paid by Harless and others was not to satisfy an admitted indebtedness from them to Swihart, but by way of compromise and settlement of the numerous differences and disputes mentioned in the stipulation. It was stipulated that Swihart should have $47.30 of that amount on account of the taxes he had paid, but neither he nor *Ellis* was intrusted with any portion of the balance of $752.70, which was deposited with Jenkins & Jenkins, and they were to pay the same to *Ellis* upon his complying with the terms and conditions of the stipulation. The amount of the mortgage held by the plaintiff ($350) was paid by *Ellis*, June 22, 1897, being prior to the service of the garnishee summons on Jenkins & Jenkins. The only dispute is whether the money so in the hands of Jenkins & Jenkins should be held on the garnishment or paid over to *Ellis* as adjudged by the trial court. It was admitted of record by the attorneys on the trial that all the conditions of the stipulation had been

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complied with, and that the $752.70 was then in court to abide the event of the suit. It is true that the release of the mortgage sent by *Ellis* to Jenkins & Jenkins prior to the garnishment was defective, and the perfected release was not executed and returned to Jenkins & Jenkins until after the garnishment. But that release or satisfaction was merely written evidence of the payment made by *Ellis*, and consequently the discharge, which occurred prior to the garnishment; so that the terms and conditions of the stipulation had been fully complied with prior to the garnishment, except that the release or satisfaction was not perfected until a short time after the garnishment, and the money held by Jenkins & Jenkins had not in fact been paid over to *Ellis*.

Counsel for the plaintiff contends that the release of the mortgage was obtained from the plaintiff by the false representations of *Ellis*, and also contends that *Ellis* was employed by the plaintiff to prosecute the action of *Swihart v. Harless and others* at the expense of the plaintiff, under an agreement that the plaintiff should be paid out of the proceeds of all money that Swihart was owing to the plaintiff; and that in the performance of such service *Ellis* worked against the interest of the plaintiff, instead of working for its interest. In answer to such contentions it is enough to say that, whatever grievance or cause of action the plaintiff may have against *Ellis*, yet it cannot be redressed in this garnishment to obtain money belonging to Swihart.

Counsel for the plaintiff further contends that, as *Ellis* made a voluntary assignment for the benefit of his creditors November 30, 1894, and as most of his services in the action of *Swihart v. Harless and others* were performed prior to such assignment, they necessarily passed to his assignee, and so did not belong to *Ellis* at the time of the garnishment. But the plaintiff has no right to the value of such services by reason of that assignment, and cannot vicariously obtain the same for the benefit of such assignee, much less for itself.

Counsel for the plaintiff contends that the money was paid

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into court as Swihart's money, and that the plaintiff was entitled to the same by virtue of its garnishment, unless *Ellis* had a prior claim thereto. But the real question is whether the money was the property of Swihart at the time the garnishee summons was served upon Jenkins & Jenkins. The stipulation was made nearly two months prior to such garnishment. By the terms of that stipulation the $752.70 was to be paid to *Ellis* upon his procuring the release of the mortgage and performing the other things therein specified. Those things were all performed, and the mortgage paid, and a defective release thereof delivered, prior to the garnishment, and a perfected release delivered very soon after the garnishment. By the stipulation Swihart consented that the money should be so paid to *Ellis*. Swihart made a written assignment to *Ellis* of the entire proceeds of that litigation and settlement under date of April 30, 1897, being the same date as the stipulation. True, it is contended that Swihart did not in fact sign that assignment until some time after the garnishment; but that assignment, after all, was nothing more than a written acknowledgment on the part of Swihart that *Ellis* could have the money, subject to the terms and conditions mentioned in the stipulation. Had *Ellis* failed to procure the release of the mortgage, or had there been a failure to execute the quitclaim deed therein mentioned, the money so on deposit with Jenkins & Jenkins would necessarily have been returned to U. A. Harless. In no event was that money, by the terms of the stipulation, to be paid over to Swihart. He had no right, title, or claim to the same at the time of the service of the garnishee summons.

We find no material error in the record.

*By the Court.*—The judgment of the circuit court is affirmed.

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LA FAVE, Respondent, vs. CITY OF SUPERIOR, Appellant.

*October 21 — November 7, 1899.*

*Municipal corporations: Injury from defective sidewalk: Court and jury: Damages: Future disability.*

1. In an action for injuries alleged to have been caused by a defect in a sidewalk four feet wide and constructed of planks laid lengthwise, it is *held* that a break and sagging in one of the outside planks, which was but six inches wide, the remainder of the walk being in good condition, did not as a matter of law render the sidewalk defective at that place.
2. An instruction in such case that the sidewalk was defective as matter of law is *held* peculiarly liable to mislead the jury, since the nature and location of the break were important upon the question of plaintiff's contributory negligence, especially in view of evidence tending to show that he was intoxicated at the time of the accident.
3. In an action for personal injuries a charge that the jury, if they found for plaintiff, might award him such damages as the preponderance of the evidence showed he had sustained, if anything, by reason of injuries which were reasonably certain to prevent him from earning in the future, is *held* error, there being no evidence upon which to base it.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

*T. L. McIntosh*, for the appellant.

For the respondent there was a brief by *Crownhart & Foley*, and oral argument by *W. R. Foley*.

CASSODAY, C. J. This is an action to recover damages for a personal injury sustained by the plaintiff September 13, 1898, by reason of an alleged defective sidewalk. Issue being joined and trial had, the jury returned a verdict to the effect that they found for the plaintiff, and assessed his damages at $600, and that the defect in the sidewalk had existed for such length of time that the officers of the city having the streets in charge would, in the exercise of ordinary care,

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have discovered and repaired the same prior to the accident. From the judgment entered thereon accordingly the defendant appeals.

There is evidence on the part of the plaintiff tending to prove that at the time of the accident the plaintiff was about forty-five years of age; that the accident occurred between 8 and 9 o'clock in the evening; that at the time of the accident the plaintiff resided near the place where it occurred; that the sidewalk at and near that place was about four feet wide, constructed of planks two inches thick, and running lengthwise the walk, and laid on stringers; that some of the planks were longer than others; that at the place of the accident the plank on the outside — towards the lot — was about five feet long, six inches wide, and two inches thick; that the plank extended across a drain running under and crosswise the walk, and was broken directly over the drain, and sagged down into the drain so as to leave a hole between that plank and the next one to it; that the plaintiff stepped on the plank where it was broken, and went down with it, and his foot went into the hole, and he fell towards the lot, and his leg was broken; that he had been drinking some whisky two or three hours before the accident. On the part of the defendant there is evidence tending to prove that the walk was not as defective as claimed by the plaintiff, and that the plaintiff was intoxicated at the time of the accident.

Error is assigned because the court instructed the jury that the sidewalk at the place testified to was defective as a matter of law. There is no claim that the sidewalk was not in good condition at the place mentioned, except that the outside plank toward the lot was broken as indicated. There was still a good walk, at least three and one-half feet wide, for pedestrians to walk upon. While the plaintiff's evidence tended to prove that the outside plank was defective, yet it did not conclusively follow that the sidewalk at that place was defective. Whether it was defective

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or not was, in our judgment, a question of fact for the jury. *McNamara v. Clintonville*, 62 Wis. 209; *Richards v. Oshkosh*, 81 Wis. 228; *Orttel v. C., M. & St. P. R. Co.* 89 Wis. 132; *Morrison v. Madison*, 96 Wis. 454, 455. It was error to hold, as a matter of law, that the walk was defective merely because the outside plank was defective. Such questions are usually for the jury. *Id.* Of course, there are cases where the question can be determined as a matter of law. *Prideaux v. Mineral Point*, 43 Wis. 513; *Kleiner v. Madison*, *ante*, p. 339. The fact that the defective plank ran lengthwise the walk and was on the outside thereof, and only six inches wide, was important upon the question of contributory negligence,— especially in view of the evidence bearing upon the question whether the plaintiff was or was not intoxicated at the time of the accident. The instruction given, therefore, was peculiarly liable to mislead the jury. Of course, a sober man, in the exercise of ordinary care, may be able to walk safely upon a much narrower walk than a drunken man. But we cannot say that there was any error in charging the jury either upon the subject of intoxication or contributory negligence.

The court charged the jury that, if they found for the plaintiff, they were at liberty to award him such damages as the preponderance of the evidence showed he had sustained, if anything, by reason of injuries which were reasonably certain to prevent him from earning in the future. We find no evidence upon which to base such charge, and hence it was error.

We find no error in the admission or exclusion of jurymen. The law on the subject is so well settled by this court as not to require repetition. *Sutton v. Fox*, 55 Wis. 531; *Santry v. State*, 67 Wis. 65; *Grace v. Dempsey*, 75 Wis. 320, 321; *Baker v. State*, 88 Wis. 149–154.

*By the Court.*— The judgment of the superior court of Douglas county is reversed, and the cause is remanded for a new trial.

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## McCORD, Appellant, vs. HILL, Respondent.

*October 23 — November 7, 1899.*

*Pleading: Demurrer after answer: Public lands: Trusts.*

1. A general demurrer to a complaint, after answer, put in by stipulation and treated by both parties and the trial court as an ordinary demurrer, is so treated upon appeal from an order sustaining it.
2. A complaint which seeks to have the court adjust equities between rival claimants to government land is fatally defective if it fails to show that the United States has parted with the title and that it has become vested in the individual against whom it is sought to enforce the supposed equities.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Sanborn, Luse & Ellis*, attorneys, and *Lyman T. Powell*, of counsel; a brief in reply by *Sanborn, Luse & Ellis;* and the cause was argued orally by *A. L. Sanborn* and *L. K. Luse.*

For the respondent the cause was submitted on the brief of *A. B. Ross.*

BARDEEN, J. The purpose of this action is to have the defendant adjudged to hold the title to certain lands described in the complaint as trustee for the plaintiff, and to require him to make a proper conveyance thereof. It appears from the complaint that the lands in question prior to February, 1891, were a part of the public domain. One Jacobus made a settlement thereon, and on the day the lands were opened for entry he applied to the local land office, and claimed the right of homestead entry. On the same day the defendant made a filing. The entry of Jacobus was rejected. The matter was brought before the commissioner of the general land office by proper proceedings, and the defendant's entry was canceled and the Jacobus entry allowed. In due time, as he supposed, Jacobus made

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proper commutation proofs, and received his final certificates. He then sold the land to the plaintiff and one McLeod, and removed therefrom. It was afterwards discovered that his commutation proofs were premature and ought not to have been received. The defendant thereupon entered a contest, on certain grounds set out in the complaint, but not material to this decision, which resulted in the Jacobus entry being held for cancellation. The complaint further sets out certain facts under which it is claimed that the land officers, by mistake of law, erroneously canceled the Jacobus entry, and also that defendant was estopped from making any claim to the land. The view we have taken of the case renders it unnecessary to set out at length the allegations with reference to the matters alluded to.

The defendant made answer to the original complaint. Afterwards the complaint was amended, and a new answer was interposed. By stipulation it was agreed that the defendant might "interpose a demurrer in the nature of a demurrer *ore tenus*" to the complaint, and that it might be submitted to the court in vacation with the same effect as though done at the term, and be disposed of upon written briefs. A written demurrer was interposed, based upon the ground that the complaint failed to state facts sufficient to constitute a cause of action. Upon the hearing the court entered a formal order sustaining said demurrer and giving the plaintiff twenty days in which to serve an amended complaint. The plaintiff served notice that he elected to stand on his amended complaint, and thereafter a judgment was entered dismissing the complaint, and for costs to defendant. From this judgment the plaintiff has appealed.

The proceeding adopted by the parties was somewhat anomalous. Ordinarily a demurrer after answer would not be deemed proper, but it having been put in by stipulation, and having been treated by both parties in the light of an

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ordinary pleading of that kind, we shall so consider it. The recitations in the judgment are sufficient to clear up any doubt we might entertain on the question. Holding, therefore, that the complaint is challenged by a demurrer based upon the ground that it does not state facts sufficient to constitute a cause of action, we shall proceed to consider it in that view.

We have only to deal with the amended complaint. It is upon that the plaintiff has elected to stand, and upon the sufficiency of which his rights are to be determined. We have made a most careful scrutiny of this pleading, and, so far as we are able to determine, the land, the title to which we are asked to adjudge in the plaintiff, yet belongs to the government. Although such an allegation appears in the original complaint, there is no allegation from which, either directly or by inference, we can determine that the title to this land has ever passed from the United States. It is not alleged that the defendant has any right or claim to the land, beyond his preference right of entry as the contestant of the Jacobus homestead claim. We are not advised whether he has ever exercised his rights in the premises, except the vague inference that can be drawn from that part of the complaint where it states, "Nor was any entry of said land made or allowed or authorized to be made by the said *John F. Hill* until long after the passage and publication of said act of Congress." This is entirely too indefinite to base a conclusion upon that *Hill* has obtained such a title that the court can seize hold of it and impress it with the trust sought to be enforced. It is only after the United States has parted with its title, and the individual has become vested with it, that the equities on which he holds it may be enforced, and not before. *Johnson v. Towsley*, 13 Wall. 72; *Shepley v. Cowan*, 91 U. S. 330; *Marquez v. Frisbie*, 101 U. S. 473. Such being the law, a complaint which seeks to have the court adjust equities between rival claim-

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ants to government land is fatally defective if it fails to show that the title has become vested in the individual against whom it is sought to enforce supposed equities.

*By the Court.*— The judgment of the circuit court is affirmed.

On December 15, 1899, the judgment was modified so as to allow the trial court, in its discretion, to vacate the judgment and permit an amendment of the complaint so as to allege the issue of the patent to the defendant from the United States.

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COLE, Respondent, vs. DULUTH, SOUTH SHORE & ATLANTIC RAILWAY COMPANY, Appellant.

*October 23 — November 7, 1899.*

*Railroads: Fences: Depot grounds: Killing of animals on track: Court and jury.*

1. Where the grounds left unfenced and treated by a railway company as depot grounds are unusually extensive and the *locus in quo* is outside of and beyond the switches and side tracks, and is not used as a place of access by the public or patrons, either for freight or passengers, and only for the passing or standing of trains, the question whether it is necessary for and used as depot grounds is properly for the jury.
2. Under sec. 1810, Stats. 1898, a railway company is absolutely liable for the killing of animals if they came upon its road at a point (not in fact depot grounds) where it was unfenced, even though it omitted the fence in good faith because it considered the locality depot grounds.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

In May, 1898, defendant maintained a flag station at what is known as South Range, a village of some thirty families. It had no depot building, but a platform on which freight was received and delivered, and a switch track about 1,500

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feet in length. The road was fenced generally, but a space was left unfenced at this station, a little more than 2,800 feet in length, commencing 580 feet south of the south switch, and ending 670 feet north of the north switch. The platform was located opposite the south end of the switch track, and immediately south thereof was the traveled highway. The track, from this highway to the cattle guard at the commencement of the fence south of it about 500 feet, was not accessible or used for purposes of loading or unloading cars or receiving or landing passengers. It was crossed about 180 feet south of the highway by two tramways connecting parts of a lumber yard, and immediately south of the tramways appears to have been a legal section-line road, but not worked or traveled. There were ditches on both sides of the track, of considerable depth, usually containing water. Trains were accustomed to run down into this locality in order to back onto the switch; also, to stand there at times when delivering freight upon the platform. There was conflicting evidence as to the custom of trainmen to walk along this track for purposes of inspection while the train was so standing. Plaintiff turned his horses out onto the highway during the night, and they passed from the highway southward onto the railroad right of way, and were run into and killed at from 150 to 180 feet south of the highway. The court, by proper instructions, not excepted to, submitted the question whether the place of entry on the right of way was depot grounds. A verdict for the plaintiff was followed by judgment, from which defendant appeals.

For the appellant there was a brief by *Catlin, Butler & Lyons*, and oral argument by *Thos. E. Lyons.*

*H. V. Gard*, for the respondent.

DODGE, J. Two questions are raised upon this appeal: First, was the *locus in quo* depot grounds as matter of law?

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Secondly, if not, is the defense of contributory negligence open to the defendant?

1. Where, as here, the grounds left unfenced and treated by a railway company as depot grounds are unusually extensive, and the *locus in quo* is outside of and beyond the switches and side tracks, and is not used as a place of access by the public or patrons, either for freight or passengers, and only for the passing or standing of trains, the question whether it is necessary for and used as depot grounds is properly for the jury. *Fowler v. Farmers' L. & T. Co.* 21 Wis. 77; *Plunkett v. M., S. S. M. & A. R. Co.* 79 Wis. 222; *Grosse v. C. & N. W. R. Co.* 91 Wis. 482; *Mills & Le Clair L. Co. v. C., St. P., M. & O. R. Co.* 94 Wis. 336.

2. It is contended by appellant that the situation presented does not fall within the statute making liability of a railway company absolute in case of its failure to fence its road, for the reason that, as appellant claims, it had in good faith done so, and omitted the place in question only because considered depot grounds. This contention does violence to the words of the statute (sec. 1810, Stats. 1898). Until it shall build fences along both sides of its road (depot grounds excepted), and place cattle guards, the company is made absolutely liable. It is only after *such* fences and guards have been constructed that contributory negligence may be urged as a defense. Sec. 1810. If the 500 feet south of the highway in question are not in fact depot grounds, the defendant has not yet complied with the statute, and is absolutely liable for injuries occasioned by the omission to fence.

*By the Court.*— Judgment affirmed.

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SUPERIOR CONSOLIDATED LAND COMPANY, Respondent, vs. THE CITY OF SUPERIOR, Intervener, Appellant.

104 463
106 228
106 665
104 463
108 255
104 468
110 405
104 468
114 275
104 463
116 500
104 463
117 576

*October 23 — November 7, 1899.*

*Appeal: Jurisdiction: Return.*

The supreme court acquires no jurisdiction of an appeal from an order if the return thereon fails in material particulars to comply with sec. 3050, Stats. 1898; as where the original of an essential paper is not included in the return and it does not appear that the court directed a copy to be substituted, and it does not appear, either from the clerk's certificate or from recitals in the order in connection with the papers transmitted, that the return contains the papers used by each party on the application for the order.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Appeal dismissed.*

The action was brought against the defendant county to set aside taxes returned delinquent by the city treasurer of the city of *Superior*. Such city, upon a petition setting forth its interest in the litigation, asked to be made a party defendant in order to answer the complaint and protect such interest. The motion was denied, and the city appealed. The return on the appeal does not contain the original complaint. The clerk's certificate is to the effect that the papers returned are all the papers involved in the appeal.

*T. L. McIntosh*, for the appellant.

For the respondent there was a brief by *A. L. Sanborn*, attorney, and *Catlin, Butler & Lyons* and *S. L. Perrin*, of counsel, and a brief on the motion to dismiss by *A. L. Sanborn*, and the cause was argued orally by *Mr. Sanborn*.

MARSHALL, J. The appeal must be dismissed for want of a proper return. Sec. 3050, Stats. 1898, provides that on an appeal from an order the clerk shall transmit to the supreme

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court, in addition to such order, the original papers used by each party on the application therefor, and, annexed thereto, a certificate under his hand and the seal of the court that they are the original papers or copies, as the case may be, and that they are transmitted pursuant to the appeal. The section further provides that copies of papers may be transmitted instead of the originals, by special direction of the court. The return before us fails to comply with the requirements indicated in several material particulars. The original complaint is not in the return, nor does it appear that the court directed a copy to be transmitted in place of such original. It does not appear, either from the clerk's certificate or from recitals in the order appealed from in connection with the papers transmitted, that the return contains the papers used by each party on the application for the order. Such defects are fatal to the jurisdiction of the court to entertain the appeal. *Flanders v. Sherman*, 19 Wis. 178; *Carpenter v. Shepardson*, 43 Wis. 406; *Glover v. Wells & M. G. Co.* 93 Wis. 13; *Hoffman & B. Mfg. Co. v. Burdick*, 95 Wis. 342; *Tenney v. Madison*, 99 Wis. 539.

*By the Court.*—The appeal is dismissed.

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## HODGES and others, Respondents, vs. NALTY, Appellant.

*October 23—November 7, 1899.*

*Contracts: Subscriptions: Enforcement: Parties: Action by one on behalf of many: Joint or several liability: Principal and agent.*

1. Subscribers to a fund for the construction of a church, who have built the church and incurred obligations therefor on the faith of the subscriptions, are the real parties in interest who may maintain an action to collect an unpaid subscription.
2. In such a case seventy-five is *held* a sufficient number to justify the court in allowing one or more to sue for all under sec. 2604, Stats.

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1898, on the ground that the parties are very numerous and that it would be impracticable to bring them all before the court.

3. A promise to pay such a subscription, even if made directly to a committee, is *held* to have been made to them as agents for all the subscribers who should join in the enterprise, and the latter, as principals, may maintain an action upon it.

4. The liability of each subscriber to such a fund is a several one, and hence is to be enforced in an action at law against him alone.

APPEAL from an order of the circuit court for Green county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

This is an appeal from an order overruling a demurrer to the complaint. The action is brought by ten persons, who are alleged to be members of St. Victor's Church Congregation, of Monroe, Wisconsin, an unincorporated religious society, against the defendant, who is also alleged to be a member of such congregation. The complaint alleges that in January, 1892, the plaintiffs and the defendant and three other persons were selected as a committee to receive and collect subscriptions for the building of a new church for said congregation, and to manage the building thereof, and that it was determined by the parties to this action and the members of said society that it would be necessary to raise about $10,000 therefor; that at a meeting of said committee a resolution was passed to the effect that said committee subscribe to the list to build a church to cost not less than $10,000, and that if said $10,000 should not be collected the subscriptions should be null and void; that the defendant was active in encouraging and inducing others to subscribe, and himself subscribed the sum of $1,000, to be paid one half July 1, 1892, and the other half January 1st following; that in signing said subscription he signed as follows: "Nalty Family, $1,000;" that said subscription was made by the defendant, and he thereby undertook to raise for that purpose said sum of $1,000, but did not disclose of whom he intended to collect any part of the sum, but stated and



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caused it to be understood that he, by himself or by the help of the other members of his family, would raise that amount and pay the same to the committee to be used in the construction of said church, and that by said subscription he definitely agreed, in consideration of the subscriptions of others then made and to be made, to pay said amount to said committee to be used in the erection of said church; that said subscription was thereafter widely circulated; and that defendant's subscription, together with others, was used as an inducement to lead many others to subscribe, some of whom signed the subscription list, and others executed promissory notes; that a church was actually erected, costing about $11,000 or more, and that nearly all of the said subscribers paid their subscriptions, relying on the defendant's subscription; that said members of said committee and the other subscribers incurred obligations and liabilities to a large amount for material and labor for said church, and became liable to a large amount therefor, and that all the plaintiffs were subscribers for the same purpose, and paid their subscriptions expecting said defendant to pay his, and relying thereon; that there was a large number of persons who signed said subscription list, or gave notes for the same purpose, and paid their subscriptions, to wit, seventy-five or more, and that there was also a large number of persons who were members of the society, to wit, 300 or more; that the sum of $10,000 and more was duly collected for the purpose aforesaid, and a church better than the one proposed was duly built by the subscribers to said fund, and that said defendant thereby became liable to pay the amount subscribed by him for the benefit of said society and its members and said other subscribers; that the number of persons interested in the collection and distribution of said subscription is very large; that the number of said subscribers is seventy-five or more, and the number of members of said religious society is 300 or more, and that the said question is one of common

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interest to many persons, and that it is impracticable and inconvenient to bring them all before the court, and that this action is brought by the plaintiffs for their own benefit and the benefit of the said other persons similarly interested; that the defendant has wholly failed to pay or cause to be paid his subscription, or any part thereof; and judgment for the amount of said subscription, with interest, is demanded.

For the appellant there was a brief by *A. S. Douglas* and *Spensley & McIlhon*, and oral argument by *Mr. Calvert Spensley* and *Mr. Douglas*.

For the respondents there was a brief by *Colin W. Wright* and *Jones & Stevens*, and oral argument by *E. Ray Stevens*.

WINSLOW, J. This is an action at law by a part of the subscribers to a building fund, who have incurred obligations on the faith of the subscription, to recover of one subscriber the amount of his unpaid subscription. That such a promise as is here alleged is valid and binding, and may be enforced by the proper parties in some appropriate form of action, is well settled. *Superior C. L. Co. v. Bickford*, 93 Wis. 220. The controlling questions raised by the demurrer here are (1) whether the action can be maintained by a part of the subscribers for the benefit of all; and (2) whether all the defaulting subscribers should be made defendants.

1. The allegations of the complaint, fairly construed, show that the total subscriptions made, including the defendant's, exceeded $11,000, of which $10,000 had been paid; that on the faith of these subscriptions a church costing about $11,000 has been erected, and obligations therefor incurred by the subscribers, who are at least seventy-five in number; and that nearly all the subscribers have paid their subscriptions, but that the defendant has not paid. That these facts made the defendant's subscription binding and enforceable by some one cannot be doubted, and the general principle is that it may be enforced by those who have accepted the

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offer and incurred obligations or expended money on the faith of the subscription. See 24 Am. & Eng. Ency. of Law, 331, note 8. In this case it is alleged that the subscribers to the fund, seventy-five or more in number, built the church and incurred the obligations. If this be so, then they are the parties who are prejudiced by the defendant's refusal to pay, and hence are the real parties in interest and entitled to sue upon the contract.

But there are alleged to be seventy-five of these parties, and the question arises whether a part may sue for all. The statute provides (Stats. 1898, sec. 2604), "When the question is one of common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." This section was recently considered in the case of an action to enforce payment of a subscription to a business enterprise (*George v. Benjamin*, 100 Wis. 622), and it was held that the complaint did not show a common or general interest in all the subscribers, and that the number of subscribers, which was thirty-one in that case, was not so large as to be called very numerous and render it impracticable to bring them all before the court; hence it was held that all must join in that case. That case rules the present case upon the first branch of the section, but as to the second branch the question is still open. Seventy-five persons is surely a very large and unwieldy number of persons to join in an action when it is practicable for a few to settle the controversy for the benefit of all. A line must be drawn somewhere, and, while it may be difficult to draw it at any precise number, we hold that seventy-five is a sufficient number, in a case like the present, to justify the court in allowing one or more to sue for all. See note to *Phipps v. Jones*, 59 Am. Dec. 708. There is therefore no defect of parties plaintiff. The ten subscribers named as plaintiffs may prosecute the action for the ben-

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efit of all the subscribers who have paid their subscriptions and erected the church, and the action so prosecuted becomes in legal effect an action brought by all the subscribers.

But it is said that the complaint alleges that the defendant's promise was to pay to the committee of fourteen, and that the action should be prosecuted by the whole committee, and not by a part of such committee. It seems to be alleged in the complaint that the promise was made to pay to the committee, though the allegations are not quite clear; but, if so, still it is plain that the promise was to the committee in their capacity as agents for all the subscribers who should join the enterprise and expend money or incur obligations in building the church. The committee were the agents; the full body of subscribers, the principals; and the rule is familiar that where a promise is made direct to an agent, even in such form that the agent may sue upon it himself, still the principal may step in and sue thereon in his own name. *Kirschbon v. Bonzel*, 67 Wis. 178. In this case the whole body of subscribers are suing, not the committee.

2. The liability of each subscriber is a several liability, and not a joint liability with the other subscribers, and hence is to be enforced in an action at law against him alone. *Gibbons v. Grinsel*, 79 Wis. 365. Whether the plaintiffs will show themselves entitled to recover the whole amount of the subscription, or only a ratable proportion thereof, will depend upon the testimony showing the total amount of subscriptions and the total amount of expenditures.

Whether the defendant bound himself personally by the signature "Nalty Family" may also be a question to be decided upon the trial, in the light of proper evidence showing the surrounding circumstances under which the subscription was made. Under the allegations of the complaint, however, the question is not open upon this demurrer.

*By the Court.*— Order affirmed.

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## Rudolf and others, Appellants, vs. Malone and others, Respondents.

*October 23—November 7, 1899.*

*Sureties: Discharge by county court: Cumulative bond of executor: Contribution: Estoppel.*

1. Prior to the enactment of ch. 335, Laws of 1897, county courts had no power, by the taking of a new bond or otherwise, to discharge sureties on the bond of an executor or administrator from liability for either past or prospective misconduct of an executor, administrator, or trustee; but such new bond, if taken, was merely cumulative.
2. The sureties on the second or cumulative bond of an executor, which was signed by five of the sureties on the first bond and three other persons, may enforce contribution from sureties on the first bond who did not sign the second, to recover the latter's share of an amount paid by the plaintiffs by reason of embezzlement by the principal prior to the execution of the second bond; and recitals in the second bond that one of the signers of the first desired to be released and another had removed from the county do not operate as an estoppel against the plaintiffs, nor do they show an agreement between the parties that the sureties on the second bond were to be primarily liable.

Appeal from a judgment of the circuit court for Rock county: John R. Bennett, Circuit Judge. *Reversed.*

This is an action for contribution, brought by eight sureties against three alleged co-sureties for money paid on bonds given by one W. T. Rambusch as executor of the will of one John Nelson, deceased. The complaint alleges the appointment of Rambusch as executor, and the giving of an executor's bond by him January 5, 1892, which was signed by five of the plaintiffs and the three defendants as sureties. The complaint further alleges the issuance of letters testamentary to Rambusch; that he entered upon his duties as executor, and received property of the estate to the amount of nearly $28,000; and that he afterwards embezzled the

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sum of $13,730.15 thereof, which embezzlement is alleged to have been completed upon the 8th day of August, 1893. The complaint further alleges that Rambusch absconded in October, 1896, and committed suicide; that prior to said absconding, and on the 8th day of August, 1893, Rambusch, as principal, delivered and filed with the county court of Dodge county an executor's bond, as additional and cumulative to the first bond, which was signed by five of the plaintiffs in this action, who were also signers of the first bond, and by the three remaining plaintiffs, who were not sureties upon the first bond, and was not signed by the three defendants in this action. This second bond is set forth in the complaint, and is in the usual form of an executor's bond, save that in the recitals preceding the obligatory words the giving of the previous bond is recited and the following clause is added: "And whereas *J. E. Malone*, one of the sureties on said bond, has asked to be released from the same, and *Bernard Hauser*, another of said sureties, has ceased to be a resident of said county of Dodge: Now, therefore, if said W. T. Rambusch, executor as aforesaid, shall administer according to law and the will of the testator all the goods, chattel rights, credits, and estate of said deceased which *have* and shall at any time come to his possession," etc. Both bonds are alleged to have been in the penal sum of $40,000.

The complaint further alleges the settlement in the county court, upon due notice both to plaintiffs and to defendants, of the final account of said executor, and the determination of his embezzlement at $13,730.15, and the payment by the plaintiffs of the sum of $11,000 to the proper parties in settlement of such embezzlement, and also that the defendants have refused to pay any part of such amount, notwithstanding that the same has been demanded; and judgment for $3,000, with interest, is demanded.

To this complaint answers were interposed by the three

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defendants, setting forth a considerable number of facts, which are not necessary to be stated here, but which are claimed by the defendants to show that the second bond was in legal effect not a cumulative bond, but a substituted bond, and that, as between the plaintiffs and the defendants, the plaintiffs have no right to call upon the defendants for contribution.

Upon the trial an objection to the introduction of any evidence under the complaint, for the reason that no cause of action was stated therein, was sustained, and judgment was entered dismissing the complaint, from which judgment the plaintiffs appeal.

For the appellants there was a brief by *C. E. Hooker*, and oral argument by *Harlow Pease*.

*S. W. Lamoreux* and *M. L. Lueck*, for the respondents.

WINSLOW, J. This court has recently decided, after full consideration, that county courts, prior to the passage of ch. 335, Laws of 1897 (now found in part in sec. 4281*b*, Stats. 1898), had no power, by the taking of a new bond or otherwise, to discharge sureties from liability for either past or prospective misconduct of an executor, administrator, or trustee, but that such new bond, if taken, was merely cumulative. *Richter v. Leiby's Estate*, 101 Wis. 434. This being the law, it is evident that the giving of the second bond in this case in August, 1893, did not discharge the liability of any surety on the first bond. But it is said that, while the sureties who did not sign the first bond were not discharged from liability to the distributees or creditors of the estate, still, when the question of the right to contribution arises, the situation is different, and that the sureties on the second bond have by their own act become primarily liable, and cannot demand contribution from sureties who signed the first bond only, because the right of contribution is founded simply on equitable considerations, and does not arise from ex-

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press contract. This exact question was raised in *Thompson v. Dekum*, 32 Oreg. 506, and decided adversely to the defendants' contention here, upon reason and authority. It was there said, in effect, that if sureties are bound for a common principal, to insure the performance of the same duty or obligation, the fact that they may be bound by different instruments given at different times is immaterial; the right to contribution exists. This is the situation shown by the complaint in the present case. Nor is the rule affected by the fact that the second bond recites that one of the defendants has asked to be released from the first bond, and another has removed from Dodge county. These facts alone neither show any agreement between the parties that the second set of sureties were to be primarily liable, nor do they amount to an estoppel. Whether the allegations of the answers show a defense by way of an implied agreement or estoppel is a question which is not before us, and which is not decided.

*By the Court.*— Judgment reversed, and action remanded for a new trial.

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CROUSE, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

*October 24 — November 7, 1899.*

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*Railroads: Injury to employee: Defective culvert: Negligence: Special verdict:* Res adjudicata: *Expert testimony: Future disability: Damages: Remission from verdict.*

1. In an action against a railway company for injuries to a locomotive engineer caused by a washout at a culvert. the evidence (showing, among other things, that the culvert was two feet square and had existed a number of years without being washed out; that the water from quite an extended tract of land was drained through it, and sometimes dammed up and required time to get through;

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that the ground in which it was placed was sand and gravel; that the gravel on one side of the roadbed had recently been dug away to the depth of several feet; that a partial washout had occurred several weeks previously, which had caused one end of the culvert to drop down; and that when workmen went to replace it they found the planks old and rotten), is *held* to sustain findings of the jury that the culvert was not so constructed and maintained as to conduct through it the water reasonably to be anticipated as likely to come there during a series of years, and that it was so negligently and carelessly constructed and maintained as to be inadequate for that purpose.

2. In such a case a refusal to submit for special verdict questions as to whether a man of ordinary prudence under the circumstances would have excavated the gravel at the side of the track, and whether he ought reasonably to have expected that such excavation would be likely to cause an injury to defendant's servants, is *held* to have been proper in view of the undisputed fact that the culvert had partially washed out a few weeks before the accident by reason of the excavation, and the finding that the culvert was negligently constructed and maintained.

3. The evidence on a second trial being substantially the same as on the first, and the same special verdict having been rendered, it is *held*, on appeal from the second judgment, that a decision on the appeal from the first judgment, to the effect that the special verdict covered all the material issues and that the refusal to submit other questions and to give certain instructions was not error, is *res adjudicata*.

4. It was shown, without dispute, that plaintiff was healthy and robust before the accident in question, in which he received an injury to his back, and that at the time of the trial his spinal column was greatly affected so that he was a helpless paralytic, the symptoms and results having followed in regular sequence and in absolute consistency with a severe injury to the back. The medical experts agreed in the opinion that his condition was attributable to the injury he received, and there was no claim that he had suffered from any other disturbing or producing cause. *Held*, that the fact that the experts disagreed as to the name of his disease, and their testimony that such a disease might result from other causes, did not make it necessary to submit to the jury the question whether plaintiff's condition was the natural and probable result of his injury received at the time of the accident.

5. In an action for personal injuries caused by negligence it is not necessary to a recovery that the plaintiff's subsequent condition should

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be the "natural and probable" result of his injuries; it is sufficient if the damage claimed legitimately flows directly from the negligent act, whether it might have been foreseen by the wrongdoer or not.

6. In such a case it is error to permit an expert witness to give his opinion as to the necessity of medical attendance and the services of nurses for plaintiff in the future, and as to the extent to which such medical attendance would be required. DODGE and WINSLOW, JJ., dissent.

7. Plaintiff's recovery not being excessive, the error in including future medical attendance and nursing as an element of damages may be cured, at plaintiff's option, by the remission from the verdict of such sum, fixed by the supreme court, as will leave it reasonably certain that no injustice is being done.

APPEAL from a judgment of the circuit court for Rock county: R. G. SIEBECKER, Judge. *Reversed.*

This is the second appearance of this case in this court. Upon the former appeal a judgment for plaintiff was reversed, and the cause was remanded for a new trial. 102 Wis. 196. The case was tried again upon substantially the same testimony, the same special verdict was submitted to the jury, and like answers returned as in the former trial. It seems unnecessary to restate the facts. For convenience, the special verdict is given.

"(1) Was the culvert in question so constructed and maintained as to conduct through it the water which it was intended to conduct through, not only in ordinary showers, but in severe showers that would naturally occur during a series of years, and which could reasonably be anticipated? *A.* No. (2) Was the culvert in question negligently and carelessly constructed and maintained by the defendant company, or its agents or employees, so as to render it inadequate for the purpose for which it was constructed? *A.* Yes. (3) Was the said culvert carefully and thoroughly inspected from time to time by the employees of the company whose duty it was to give such inspection? *A.* It was not. (4) Did the nearness of the gravel pit to the culvert,

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in the month of July, 1896, render said culvert unsafe, in view of the water that might be conducted through it? *A.* Yes. (5) Was the rainstorm on the night of July 26, 1896, extraordinary, unusual, and unexpected in its character, or unprecedented, and one which had only occurred at such long and irregular intervals that it would not be anticipated by men of ordinary prudence in their business calculations? *A.* No. (6) Might the washout in the track have been discovered by the defendant railroad company by reasonable and proper inspection, and in time to have prevented the accident? *A.* Yes. (7) Was the storm which occurred on the night of July 26, 1896, one likely to cause damage to the defendant's roadbed and track where the culvert in question was situated? *A.* Yes. (8) Was the defendant's servant Stageman guilty of any negligence in not properly and carefully inspecting the road near where this culvert was, on the night in question? *A.* Yes. (9) Was the plaintiff in the exercise of ordinary care at and prior to the time of his injury? *A.* Yes. (10) Was the plaintiff injured on the night in question in consequence of the washout, without contributory negligence on his part? *A.* Yes. (11) What damages has the plaintiff sustained in consequence of the injury received on the night in question? *A.* $20,000."

Judgment was entered for plaintiff, and the defendant appeals.

For the appellant there was a brief by *Fish, Cary, Upham & Black*, attorneys, and *Edward M. Hyzer*, of counsel, and oral argument by *Mr. Hyzer*.

For the respondent there was a brief by *Fethers, Jeffris & Mouat*, and oral argument by *O. H. Fethers* and *M. G. Jeffris*.

BARDEEN, J. 1. Questions 1 and 2 of the special verdict related to the manner in which the culvert where plaintiff was injured was constructed and maintained. The jury

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found that it was not so constructed and maintained as to conduct through it the water reasonably to be anticipated as likely to come there during a series of years, and that it was so negligently and carelessly constructed and maintained as to be inadequate for that purpose. In the opinion of defendant's counsel the court ought not to have submitted these questions, because there was no evidence in the case to warrant their submission, and because they do not cover any issue raised by the evidence. It is unnecessary to enter into any lengthy discussion of the evidence. It is sufficient to say that, in our opinion, there is not only evidence enough to warrant their submission, but ample to support the jury's conclusion. The culvert was about two feet square. The water naturally coming there was drained from quite an extended tract of land. The ground in which the culvert was placed was sand and gravel, easily susceptible to the action of water. This is a matter of common knowledge. The opening was so small that water would dam up and require some time to get through. A few weeks before the accident, the culvert had partially washed out; so much so that the west end had dropped down, and the water had made a great cave in the side of the roadbed. When the workmen went to replace it, they found the planks were old and rotten. The digging away of the gravel to the west, as the jury found, made the situation more dangerous and unsafe. The fact that the culvert had existed a number of years without having been washed out is of little significance when we come to consider that the excavation of the gravel pit at the west side was of recent origin. That such excavation greatly increased the danger of washing is established by the evidence and found by the jury. Under these circumstances the submission of these questions and the finding of the jury thereon seem quite proper.

2. The defendant requested the court to submit two questions as a part of the special verdict, relating to the facts of

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whether a man of ordinary prudence, under the circumstances, would have excavated the gravel at the west of the track, and whether he ought reasonably to have expected that such excavation would be likely to cause an injury to defendant's servants. The argument in support of the submission of these questions is based upon the contention or assumption that there was no testimony to support the submission of questions 1 and 2, above referred to. Without such assumption this argument has no foundation. It being an undisputed fact in the case that the culvert had partially washed out a few weeks before the accident by reason of the close proximity of this gravel pit, and it being found that the culvert was so constructed and maintained as to render it inadequate for its purpose, it is difficult to see why the questions requested should have been submitted. As said in the former opinion: "If the bridge was constructed for the passage of heavy trains over it, and was negligently and unsafely constructed, the destruction of a train and the loss of human life thereon must necessarily be contemplated by any reasonable man who builds it. He cannot say he did not anticipate an accident."

3. On the question of contributory negligence the court submitted questions 9 and 10, as above stated. The defendant requested the submission of questions as follows: (1) "As the plaintiff approached the locality of the culvert in question, were indications of high water, which would cause damage, observed by him?" (2) "Was the plaintiff notified between Koshkonong and Milton Junction that there had been a heavy rain and the sides of the track were washed?" (3) "As the plaintiff approached the culvert in question, was he keeping his train under complete control and at such speed that it could be stopped after coming in sight of any obstruction or damage to the track in time to prevent accident?" (11) "Did a violation by the plaintiff of any rule or rules of the company contribute to his injury?"

On the former trial of this case one of the strongest con-

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tentions was that the evidence conclusively showed that the plaintiff was guilty of contributory negligence. As will be noted in the former opinion this claim was based upon certain rules of the company which required the engineers in charge of trains to exercise great care in keeping their trains under control during rainy spells, and great reliance was placed on Rule 414 as fixing the standard of care which it is claimed was violated. Several questions were proposed similar to the ones asked on the second trial, and, in addition, the defendant asked the court to instruct the jury that, if plaintiff was running his train in violation of any rule of the company, he was not in the exercise of ordinary care. Other instructions of like import were requested, and all were refused. At no place in his charge did the court refer specifically to any violation of the rules of the company as being negligence, nor was that question specifically covered by any question in the special verdict. Upon this condition of the record, and after a careful review and consideration of the same, this court held that contributory negligence as a matter of law was not conclusively established; that the refusal to submit the questions requested was not error; that the questions submitted covered all of the material issues in the case; and that the refusal to charge did not constitute reversible error. A precisely similar situation is presented on this trial, except that the defendant made no request that the court should charge the jury that a violation of the rules of the company would be negligence. Hence it will be seen that the case is not as strong in favor of the defendant as on the former hearing. Case after case has been considered and approved by this court where the submission of the question of contributory negligence was substantially the same as in this case. A few of the recent cases are here noted: *Klatt v. N. C. Foster L. Co.* 97 Wis. 641; *Wilber v. Follansbee*, 97 Wis. 577; *McDougall v. Ashland S. F. Co.* 97 Wis. 382; *Kenyon v. Mondovi*, 98 Wis. 50;

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*Welty v. Lake Superior T. & T. R. Co.* 100 Wis. 128. In *Raymond v. Keseberg*, 98 Wis. 317, this court said: "The form of the questions is to be determined by the trial court; and so long as they conform to the requirements of the statute and cover the material issues there can be no error."

But a paramount reason why we must hold the verdict submitted on this trial sufficient, and as covering all the material issues in the case, is that it was so decided on the former hearing. It stands as *res adjudicata* and, whether right or wrong, is the law of the case. *Case v. Hoffman*, 100 Wis. 314. The question of whether the plaintiff was running his train in violation of any rule of the company is a mere evidentiary fact from which the inference of negligence might arise. While, perhaps, it would have been better practice to have submitted the fact squarely to the jury by a question similar to the one requested, and a refusal to instruct the jury thereon might be prejudicial error within the rule laid down in *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109, and *Dugal v. Chippewa Falls*, 101 Wis. 533, yet, so far as this case is concerned, the question has been foreclosed by the former decision.

But it is said the requests to find, under former decisions of this court, are equivalent to requests to charge on the particular point suggested, or are sufficient to call the court's attention to the fact, and a neglect to charge is error. We admit the existence of the rule, within the decisions mentioned, and that it is a just and proper one, but its application to this case must be denied because of the former decision. On the former hearing the questions, with a request to charge, were before the court. Admitting the application of the rule before mentioned, the situation now presented is in no way different. Undoubtedly the judge who presided at the last trial made a study of the former record. This is evidenced by the fact that he declined to change the form of the special verdict, because it had met the ap-

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proval of this court. The two situations being precisely the same in legal effect, what was said in the former opinion, which seems to fully cover the question at issue, leaves us powerless to make a different ruling, if we were so disposed.

4. On the second trial the medical experts were able to state with some degree of certainty that plaintiff's spinal cord was permanently affected. One of the witnesses was quite certain that he was suffering from sclerosis of the spinal cord, and another testified that it was his belief that chronic meningitis was the disease. Both agreed that the spinal cord was greatly affected, that the plaintiff was in a helpless condition, and that such condition was reasonably certain to continue and grow worse as time passed. Upon cross-examination the doctors testified that sclerosis or meningitis might be produced by external violence, colds, rheumatism, gout, and other causes. The conditions they found were somewhat different than those presented on the first trial, and because of lapse of time and the development of the disease they were able to judge with greater certainty as to the probable cause and consequences of the plaintiff's diseased condition. The defendant claims that because of these changed conditions, and because the doctors testified that the diseases mentioned *might* result from other causes than those shown to be present in this case, the court erred in not submitting to the jury the questions directed to the inquiry of whether the plaintiff's present condition "was the natural and probable result" of the injuries he received at the time of the accident.

The medical testimony was in no dispute as to his physical condition. Both of the doctors were witnesses for plaintiff, and described his condition at length, tracing the progress of his disabilities from the time of the first examination down to the last trial. Both agree that his present condition is attributable to the injuries he received. The evidence is undisputed that up to the time of his injury plaintiff had been



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a healthy, robust man, and in the continuous service of the company for upwards of sixteen years. He met with an injury and became a helpless paralytic. His injuries were of such a character as to lead to the results found. Now it is urged that all the evidence we have in the case that plaintiff's present condition is the result of the accident is the expert testimony, and that, because the doctors disagree as to the exact name of his disease, and their testimony shows that either of the diseases named by them *might* have been produced by other causes, the jury should have been interrogated in the line above suggested, and to fail to do so was error. We admit that there are experts and experts; that many of them testify like retained witnesses, and very much of such testimony is of little more value than an intelligent guess. Yet in its legitimate field, given by men whose conception is not measured by the horizon of the parties' interests in whose favor they testify, such testimony is most valuable and helpful. There is, however, no occasion to attack it in this case. The changed condition in which the plaintiff is claimed to be nearly three years after the accident is accounted for by the doctors as the necessary consequence of the development of the injury to his back. Whether it be called *sclerosis* or *meningitis*, it matters not. The injury is certain, and no doubt would be just as severe and just as disabling if it were called simple backache. It is not the name of the difficulty, but the *fact*, that is important. The fact being in proof that plaintiff was healthy and robust before the accident, that he received the injury described, that the symptoms and results have followed in regular sequence, and in absolute consistency with a severe injury to the back, coupled with the opinion of the doctors that this condition may be directly attributed to the accident, the conclusion that it is so attributable cannot be weakened or upset by the mere suggestion of possibility that this condition may have arisen from other causes. Especially

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is this true when there is no claim that the injured party has suffered from any other disturbing or producing cause than the one testified to. Neither is it strictly proper to inquire whether the plaintiff's *condition* is the "natural and probable" result of his injuries. Under the rule of proximate cause the damages must be proximate to the wrongful act; that is, they must follow the negligent act in unbroken sequence, without any intervening independent cause to break the continuity. *Mueller v. Milwaukee St. R. Co.* 86 Wis. 340. The subsequent condition of the injured party may have been caused in part or aggravated by some predisposition to disease, as in *McNamara v. Clintonville*, 62 Wis. 207, and yet the defendant would be liable. It is not necessary to a recovery that the defendant should have foreseen the exact injury shown. It is sufficient if the damage claimed legitimately flows directly from the negligent act, whether such damages might have been foreseen by the wrongdoer or not. *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342; 3 Suth. Dam. § 1244; *Jucker v. C. & N. W. R. Co.* 52 Wis. 150.

5. The defendant further complains because Dr. Gibson, plaintiff's attending physician, was permitted to testify that the plaintiff would require medical attendance and services of nurses in the future. This testimony comes very close to, if not over, the forbidden line. It was proper for the doctor to describe his patient's condition, to state to what extent he was disabled, his inability to care for himself, and to state any other circumstance within his observation and knowledge bearing upon the reasonable certainty of a continuance of these disabilities in the future,— that is to say, he might give evidence as to the physical facts, and his opinion upon the permanency of existing conditions; but when he has testified that the injury is permanent and that the patient is paralyzed and helpless, it seems hardly necessary or proper to permit him to enter the domain of common knowledge,

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and say that because of these conditions the injured person will require nursing and medical attendance in the future. When conditions so palpable as were shown in this case are under consideration, it does not require the aid of an expert to reach the conclusion that both nursing and medical attention would be necessary in the future. The jury were as able to arrive at that conclusion without the aid of his opinion as with it. While cases may arise in which such testimony may be considered proper, we have no disposition to increase the range or broaden the field that may be covered by it until that class of cases is reached. In *Simonds v. Baraboo*, 93 Wis. 40, this court held that the admission of evidence of the usual and customary way of loading and hauling wood on a wagon was prejudicial error, because it was a matter of common knowledge and the testimony might have been harmful to defendant. Applying that rule to the facts in this case, the conclusion we have reached finds ample support.

But plaintiff's counsel was not content to show by the expert the necessity of future medical attendance and nursing as a matter of opinion. The following question and answer were admitted, against proper objection: "(2) To what extent, in your judgment, will the attendance of a physician be necessary in the future, so long as the plaintiff shall live? *A.* Well, I should think it would vary. At present, I should think, once a week. As time goes on, I should think, oftener." From the very nature of the case it was impossible for any one, even though he be an expert witness, to know to what extent a physician's services would be needed in the future. The doctor's answer shows that he was ranging around in the field of speculation and conjecture. No criticism is intended of the witness, for he was undoubtedly giving his best judgment upon the extremely precarious data at his command. It is the lane leading to a very broad field we are fencing. We need not enter its broad acres. If we were to once open the gate, there is no limit that we can

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foresee to which the fertility of counsel will not go. Opinion evidence is dangerous unless confined to its legitimate scope. The necessities of litigation have demonstrated the propriety of permitting the plaintiff to call upon experts to assist in establishing the condition, the cause of the condition, and the reasonable certainty that such condition will be permanent. To that extent it is legitimate and proper. No case is called to mind that extends the rule beyond this limit. If the expert may testify to the future necessity of medical attendance, and its frequency, there is very little left for the jury. A prime objection to such testimony is the difficulty on the part of the other side to meet it. One doctor might say that attendance would be needed daily, another weekly, and still others at variant periods. One man calls the doctor at the occurrence of the first symptoms, while another doctors himself or awaits the development of the trouble. With these conditions present as a part of human experience, a jury would find themselves floating in the realm of doubt and speculation, with very little that was solid or substantial to tie to if the door of the future should be opened to the extent suggested. It is our duty to keep the administration of justice as unembarrassed as possible, and it can best be done by freeing it of as many uncertainties as possible. We are loath to broaden the range of expert testimony, and are therefore compelled to hold that the testimony mentioned was distinctly improper and prejudicial. Its badness was emphasized by the use made of it by plaintiff's counsel in their argument to the jury. It was singled out as a definite item of damages, at a specified rate per year, and dwelt upon with the suggestion that it would increase in the future. Its tendency was to increase the damages and swell a recovery.

This is the only prejudicial error discovered in the case. The same kind of testimony was offered and received on the former trial, although its reception was not assigned as error. Two juries have returned the same verdict. From their stand-

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point, the plaintiff is entitled to substantial damages. The verdict is large, but we cannot say that it is unwarranted, or the result of passion or prejudice, except in the particular noted. Undoubtedly it was increased by the testimony hereinbefore condemned. Of course, it is impossible to determine with certainty how much was allowed on this item of damages. Considering the nature of plaintiff's injuries, and the fact that his days of usefulness are at an end, we would not say that a verdict for the full amount would be too large. But the jury has fixed that as the limit for his entire recovery, inclusive of the objectionable items mentioned. Upon the precedent established in *Baxter v. C. & N. W. R. Co.*, *ante*, p. 307, it is proper, in the interest of justice and to end litigation, for this court to fix a sum to be deducted from the recovery that will leave it reasonably certain that no injustice is being done. While I was not in favor of the rule established in that case, it is the law in this state, and this is considered to be a proper case in which to administer it. As has been stated, the plaintiff is suffering from a most serious and incurable injury, and his condition is almost certain to grow worse instead of better. The objectionable element of damages included in the verdict could not have increased the recovery to any very great extent. A full and careful consideration of the whole case has led us to conclude to exclude from the recovery the sum of $2,000, giving the plaintiff the option either to reduce his judgment that amount or submit to a new trial.

*By the Court.*— The judgment of the circuit court is reversed, and the cause is remanded for a new trial, but with an option to plaintiff within twenty days after the filing of the *remittitur* to take judgment against the defendant for $18,000 and costs.

DODGE, J. I find myself unable to concur in the conclusion that there was error in receiving as expert evidence the opinion of Dr. Gibson to the effect that the plaintiff would

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require assistance in the way of nursing and would require medical attendance in the future. As to the first element, while I think the evidence approached closely the field of common knowledge, from which expert testimony should be carefully excluded, I do not think it prejudicially crossed the line. It went no further than to describe the extent of the present disability and needs of the patient, and to declare the probability of their continuance. The plaintiff's counsel attempted to go much further, and to prove by the medical expert how many nurses or attendants would be requisite; but were restrained by the court. The necessity for future medical attendance, however, seems to me to present a field in which the opinion of a physician may be very valuable, and in which nonprofessionals may be much at sea without it. We have in this case severe spinal injury and disordered nervous system. Some of us know, in a general way, that from disturbance of the nerves may result the most varied local or functional troubles. We hear of bad action or nonaction of the kidneys, of the stomach, bowels, heart, and lungs, as mere symptoms of disturbed nervous system; but can the nonmedical man judge whether a given nerve injury will produce one or another of these symptoms, or at what intervals? Some of these troubles may and some may not be alleviated by medicament or medical treatment. Indigestion probably might; paralysis of a limb probably could not. Now, a physician should be able to form an opinion whether the known injury is reasonably likely to exhibit itself in one form or another, and, approximately, how frequently. If so, why may he not testify either to what, in his opinion, such symptoms will be, or, more generally, that they will be such as to require attention or treatment by a physician? That is not invading the ground of common knowledge, but merely invoking the peculiar knowledge and opinion of the medical expert. True, it may be uncertain, but all opinions as to future conditions involve uncertainty.

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That, however, has never been held a ground for their exclusion altogether. The privilege of cross-examination is accorded the other party for the very purpose of bringing before the jury the sufficiency of the premises on which they are founded, and the measure of certainty with which they can be given, and eliminating any part of an answer which is thus found to be mere general conjecture and not proper expert opinion.

WINSLOW, J. I concur in the foregoing dissenting opinion of Mr. Justice DODGE.

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## THE CHARLES BAUMBACH COMPANY, Appellant, vs. HOBKIRK and another, Garnishees, Respondents.

*October 24 — November 7, 1899.*

*Chattel mortgages: Fraud: Jury trial: Waiver.*

1. In garnishment proceedings to reach a stock of goods which had been taken possession of under a chattel mortgage, it appeared, among other things, that the mortgagor and mortgagees were brothers; that the mortgagor remained in possession of the stock and conducted the business as before the mortgage was given, using the proceeds as he pleased; that the mortgagees were frequently about the store and knew the manner in which the business was conducted; and that only small payments were made by the mortgagor. *Held*, that these facts showed an implied agreement that the mortgagor might so act, which rendered the mortgage fraudulent and void as to other creditors of the mortgagor.
2. The right to a jury trial of an action is waived by participating, without objection, in its trial as an equitable action.

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Reversed.*

This is a garnishment proceeding. The plaintiff sued one Robert Hobkirk upon a claim of $405.65, and at the same

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time garnished the respondents herein. The respondents answered to the affidavit of garnishment, stating, in effect, that the main defendant, Robert Hobkirk, on the 7th of June, 1894, was indebted to his father Robert Hobkirk, Sr., in the sum of $2,700, which debt was evidenced by a promissory note for the said sum, and which note was secured by a chattel mortgage executed by Robert Hobkirk and his wife to said Robert Hobkirk, Sr., said mortgage covering a certain stock of goods, wares, and merchandise in the city of Waupun, Wisconsin; that in February, 1895, said Robert Hobkirk, Sr., sold and assigned said mortgage and note to the garnishees herein, and that on the 6th of June, 1896, an affidavit of renewal of said chattel mortgage was duly made and filed. The answer further alleges that a second chattel mortgage to secure the same debt, and upon the same stock of goods, was given by the same mortgagees to the garnishees on the 8th day of December, 1896, and that a third chattel mortgage for the purpose of securing the same note was executed by the said Hobkirk and wife to the garnishees June 16, 1897; that certain payments have been made by said Robert Hobkirk, Jr., upon the said note, amounting to about $300, and no more; that on the 19th day of July, 1897, the garnishees took possession of all the goods, wares, and merchandise set forth in the said several chattel mortgages, which at cost price foot up to the amount of $3,001.50, and that said property has not yet been sold, and the garnishees claim the right to take from the proceeds of the sale of said property the principal and interest of said note, with the costs of foreclosing the mortgage.

The plaintiff took issue upon the answer of the garnishees, and the action came to trial. At the commencement of the trial the court stated: "I am disposed to submit special questions to this jury in the nature of an advisory verdict. Proceed with the case." No objection or exception was taken by either party to this remark, and the trial proceeded,

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and at the close of the case the court submitted five special questions to the jury, which questions, with their answers, are as follows: "1. Was there an existing, a *bona fide*, indebtedness at the time of the making, executing, and delivering of the note and chattel mortgages in question by the said defendant, Robert Hobkirk, and for which the same were given? *A.* Yes. 2. Were the said note and chattel mortgages in question made and given by the said defendant, Robert Hobkirk, with the intent to hinder, delay, or defraud his creditors? *A.* No. 3. Were the said note and chattel mortgages in question made and given by the said defendant, Robert Hobkirk, with the intent to hinder, delay, and defraud the plaintiff? *A.* No. 4. Were the said note and chattel mortgages made, executed, and delivered by the said defendant, Robert Hobkirk, to the garnishee defendants, *William Hobkirk* and *Frank Hobkirk*, and received by them, with such a fraudulent intent as to avoid the same? *A.* No. 5. Was the said note and chattel mortgage in question, bearing date June 16, 1897, fraudulent as to the plaintiff? *A.* No."

Upon the coming in of this verdict the garnishee defendants moved for judgment thereon, and at the same time the plaintiff moved for judgment in its favor notwithstanding said verdict. The court overruled the plaintiff's motion for judgment, to which exception was taken, and then made and filed findings of fact which consisted simply of the recitation and formal adoption of the jury's findings together with conclusions of law to the effect that the garnishee defendants were not liable to the plaintiff in any sum. Prior to the making of these findings the plaintiff requested the court to make findings in its favor to the effect that said mortgages were all fraudulent and void as to creditors.

The plaintiff appeals from judgment upon the findings in favor of the garnishee defendants.

The cause was submitted for the appellant on the brief of *C. E. Hooker*, and for the respondents on that of *E. D. Doney*.

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WINSLOW, J. The fact that the plaintiff was a creditor of the main defendant and had obtained judgment on its claim before trial of the garnishee action was established without dispute. The evidence also showed beyond controversy that there was an honest debt, amounting to $2,700, owing from the main defendant to the assignor of the garnishees when the first chattel mortgage was given, and that such debt was thereafter transferred to the garnishees, and remained their property, save for certain small payments, up to the time of the seizure of the mortgaged property, and the only serious question necessary for consideration is whether the evidence shows conclusively that the last mortgage, which was given about a month before the seizure, was fraudulent as to creditors of the main defendant, of whom the plaintiff was one. Upon well-established principles this question must be answered in the affirmative. The evidence shows that all of the successive mortgages covered a stock of goods consisting of drugs and wall paper, of which the main defendant was in possession all of the time up to the time of the seizure of the stock by the garnishees on the 19th day of July, 1897. During all of this time the main defendant conducted the business, using the proceeds of the sales as he pleased. The main defendant testified, in substance, that the stock of goods constituted his entire property except a homestead, and that during the entire time and until July 19, 1897, he conducted the business, sold the goods, used the proceeds as he pleased for the support of himself and family, the running expenses of the store, and the payment of private debts; that his brothers, *Frank* and *Will* (the garnishees) knew that he was selling the goods and using the proceeds for his own use; that they were in the store frequently, and that he thinks it was understood by him with them, when the later mortgages were given, that he should continue in the same way. Later, however, he denied that it was agreed that he should use any of the proceeds of sales for his own

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benefit or the support of his family, and claims that *nearly* his entire living expenses were derived from the profits of a news stand which he ran in connection with the drug business, and which was not included in the mortgages. The garnishee defendant *William* does not deny that he was frequently about the store, and, after much questioning, admitted that he supposed during the existence of all the mortgages that the main defendant would have to use a part of the proceeds of the business for the support of his family and to pay his private debts. The garnishee defendant *Frank* denies generally that there was any agreement that the main defendant might use any of the proceeds of sales to pay his family expenses, but does not deny that he was frequently in the store and knew the manner of conducting the business. These facts are substantially identical with the facts appearing in the case of *Bank of Kaukauna v. Joannes*, 98 Wis. 321, where it was held that the conclusive inference from such facts is "that there was an implied or tacit agreement or understanding that the mortgagor was to be at liberty to use, sell, and dispose of the mortgaged property, and apply the proceeds to his own use, in like manner as before and as if they had not been mortgaged to the bank." Such an implied agreement renders the mortgage fraudulent and void as to creditors. It is as effective for that purpose as if it were express.

A claim seems to have been made upon the trial that the stock was turned over by the main defendant and received by the garnishees in payment of the debt, and an amendment of the garnishees' answer to this effect was allowed by the court at the close of the trial. As to this claim it is sufficient to say that there is absolutely no evidence to sustain it. All the evidence on the subject shows that the mortgagees took the property under the terms of their mortgage, and not in payment or extinguishment of the debt.

The case was tried as though it were an equitable action.

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A jury was present and rendered an advisory verdict, but the court finally made findings and rendered judgment thereon, without objection or exception to that mode of trial, and in fact apparently with the consent of both parties, neither of whom demanded a jury trial. If the action was in fact one in which a jury trial is guaranteed under the constitution (a point which is not decided), still, having been tried without objection, either in the trial court or this court, as an equitable action, the right of trial by jury must be held to have been waived. *Leonard v. Rogan*, 20 Wis. 540.

*By the Court.*—Judgment reversed, and action remanded with directions to render judgment for the plaintiff in accordance with this opinion.

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BARTEL, Respondent, vs. BROWN, Appellant.

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*October 24 — November 7, 1899.*

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*Bills and notes: Agency to receive payment: Possession of note: Deposit of money at place of payment.*

1. In order to establish the fact of agency for the collection of commercial paper, rendering payment, to the proper custodian of money at such agency, a discharge of the debt, possession of such paper when due and collectible, or evidence *aliunde* of express authority to the agent, is indispensable.
2. The mere naming in commercial paper of a place for the payment thereof, does not make the proper custodian of money at such place the agent of the owner of such paper to receive such payment.
3. If a person, relying upon the fact that a place for the payment of his note is named therein, deposit there the money to pay the same, such money will remain the property of the payor till the note actually comes into possession of the depositee for the collection thereof, so that, if in the meantime the money be lost, such loss will fall on the depositor, as between him and the note holder.

[Syllabus by MARSHALL, J.]

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Bartel vs. Brown.

APPEAL from a judgment of the county court of Dodge county; J. A. BARNEY, Judge. *Reversed.*

Action to recover a statutory penalty for failure to discharge a mortgage made by plaintiff August 17, 1894, to W. T. Rambusch, to secure the payment of $1,000 with six per cent. interest thereon payable semi-annually, the due date of the note being October 1, 1897, with a privilege of paying $500 of the principal October 1, 1896. Both principal and interest were payable at the Citizens' Bank of Juneau, Wisconsin. The mortgage was assigned to the defendant by the mortgagee through the First National Bank of Beaver Dam, Wisconsin, on the 17th day of March, 1896. The mortgage and assignment were duly recorded. The facts as detailed were sufficiently alleged in the complaint, together with appropriate allegations to constitute a cause of action to recover the statutory penalty for wrongfully refusing to discharge a mortgage.

The issue formed by the pleadings was as to whether the mortgage debt had been fully paid. The evidence showed the following facts: Rambusch was president of the bank where the note was made payable. Prior to the purchase of the note by defendant, plaintiff made one payment of interest to Rambusch. The case turned on whether Rambusch or the bank was authorized to receive payment on the note from plaintiff at the time the latter deposited the $500 at such bank. When the note became due, the plaintiff, claiming credit for the $500, tendered to defendant enough more to discharge the balance of the debt, the money being at the time placed on a table during an interview between the parties, and defendant notified that it was his property but that if taken by him plaintiff would expect a satisfaction of the mortgage. Defendant took the money, declining to give such satisfaction, and plaintiff did not protest or demand a return of such money. He contented himself by insisting that the $531 was the full amount due defendant and that a satisfaction was due him.

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The court submitted the case to the jury for a special verdict, which resulted in findings as follows: Defendant did not notify plaintiff that he held the note and mortgage. All the conditions of the mortgage were complied with prior to the commencement of the action. W. T. Rambusch was agent of the defendant to collect the principal and interest on the note. When plaintiff made the payment to Rambusch or Hemmy, he required them to produce the note. Plaintiff is entitled to recover. There was a motion to set aside the verdict as contrary to the evidence, which was denied and the ruling duly excepted to. Judgment was rendered in plaintiff's favor, and defendant appealed.

For the appellant there was a brief by *Samuel A. Bostwick*, attorney, and *George F. Martin*, of counsel, and oral argument by *Mr. Martin*.

For the respondent there was a brief by *Malone & Bachhuber*, and oral argument by *J. E. Malone*.

MARSHALL, J. The most important assignment of error presented for consideration is that the court erred in not setting aside the verdict for want of evidence to support the finding that Rambusch was defendant's agent to collect from plaintiff on the note and mortgage. The pretense on the part of respondent that such an agency existed was the basis of his cause of action. The finding to that effect was necessary to the recovery. We will notice in detail the evidence in the record upon which such finding was made.

Harvey, cashier of the First National Bank of Beaver Dam, the bank through which defendant obtained the note, some time after the latter circumstance occurred and prior to the making of the disputed payment, wrote to Rambusch stating the character of the note regarding its due date, in answer to a letter asking for that information. He added a request that if *Bartel* expected to make the optional payment he desired that Rambusch would let him, Harvey,

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know a little before. The letter does not indicate authority to Rambusch to receive payments for defendant, even if it were admitted that Harvey had authority to write the letter. The proof is positive and undisputed that he had no such authority. His authority extended no further than to answer the inquiry made by Rambusch as to the due date of the note. In compliance with Harvey's request, Rambusch wrote respondent, wording his letter so as to carry the idea that he was still the owner of the note. The language was, "If you intend to pay the $500 this fall, please let me know a couple of weeks before. It can remain longer if you wish it." The next occurrence between the parties was September 21, 1896, several days before the option date of payment. Then respondent delivered to the Citizens' Bank of Juneau, by direction of Rambusch, who was present, $560, which the cashier placed to the credit of Rambusch. Nothing had occurred for which appellant was responsible to warrant Rambusch in assuming authority to receive the money from plaintiff or to direct the bank to receive it. There was no holding out of Rambusch, by the appellant, as his agent, no circumstance pointing that way, nor any reliance by respondent on the existence or appearance of an agency. The note was not in the possession of the Juneau bank at the time it received the money as aforesaid. It was in the possession of the appellant at Beaver Dam. The jury said that plaintiff required Rambusch and the cashier of the bank to produce the note at the time the $500 was delivered. That finding, on its face, is very misleading. Why the question was submitted, as the evidence stood, is not perceived. If such question, as answered, means that Rambusch and the cashier of the bank were required to produce the note as a condition of the money being paid over to the bank or to Rambusch, it is contrary to the undisputed evidence. If it means that respondent required an assertion from Rambusch that he or the bank had the note, it is in accordance with

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the evidence, but of no significance in the case. Possession of a note is evidence of authority to receive payment thereof if it is due; but mere false pretenses of having such possession is no protection to the payor whatever. Now there is left evidence that Rambusch, or the Citizens' Bank of Juneau, forwarded to the First National Bank of Beaver Dam $60 of the money mentioned to apply on interest, which was turned over to appellant, and testimony that appellant admitted having directed Rambusch, in the event of respondent paying any money, to send it to such bank. That evidence does not appear to prove, or tend to prove, that Rambusch was authorized to act as agent for appellant to receive payment on the note. All of the time he assumed to the appellant to be acting for respondent. While occupying that attitude he was directed, if directed at all, that payment should be made to the Beaver Dam bank. That it was such bank, or its officers, only, that was authorized to receive payment for appellant, is evidenced from the fact that the note and mortgage were kept there. Such fact is so inconsistent with the agency found by the jury, that the only reasonable construction of appellant's admission, if it were made just as respondent's witnesses claim, is that the money was directed to be paid on behalf of respondent at the Beaver Dam bank. That is what appellant says he did state to respondent. If, in any view of the situation, we could say there was room for a reasonable inference that appellant admitted having directed Rambusch to receive payment on the note for him and send the money to the Beaver Dam bank, it would follow that the case was properly submitted to the jury, and that their finding must stand as a verity in the case. But we cannot say that.

The importance of protecting the holders of commercial paper is so great that to warrant finding that a person who assumes to have authority to receive payment of the principal sum on any such paper, has such authority, possession



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of the paper itself by such person, or proof *aliunde* of express authority, is indispensable. As said by the court in *Smith v. Kidd*, 68 N. Y. 130, "Any other practice would be dangerous in the extreme." "If money be due on a written security, it is the duty of the debtor to see that the person to whom he pays it is in possession of the security." That is the best evidence of authority. The payor is negligent if he relies on anything less, and must abide the event of being able to establish, by clear and satisfactory evidence, an express agreement between the holder of the security and the supposed agent, authorizing the latter to represent the former in the transaction. To that familiar doctrine there are many authorities, a large number of which are collated in Jones, Mortgages, § 964. See, also, *Winkelmann v. Brickert*, 102 Wis. 50. It seems very clear that there is no evidence in this case to satisfy the rule indicated.

But it is said that the note was payable at the Citizens' Bank of Juneau, and that such circumstance of itself constituted such bank appellant's agent to receive the money on the note. On the contrary, the rule is that unless the note is at the stated place of payment for the purpose of its collection, which latter fact is not presumed from the mere possession of the paper in advance of the due date, a deposit of the money in, or payment of it to, the proper custodian of money at such place, does not discharge the debt in the absence of clear proof of express authority to receive such money. Randolph, Comm. Paper, § 1451; *Cheney v. Libby*, 134 U. S. 68; *Bank of Montreal v. Ingerson*, 105 Iowa, 349; *First Nat. Bank v. Chilson*, 45 Neb. 257; *Glatt v. Fortman*, 120 Ind. 384; *Hills v. Place*, 48 N. Y. 520. The only effect of making a note payable at a particular place is to entitle the payor to the privilege of taking up his paper at such place on the due date thereof. It implies an obligation on the part of the holder of the paper to deposit it at such place so that such privilege can be exercised. A failure to perform that obligation, if the payor at the stated

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time and place of payment appears ready and willing and of sufficient ability to take up his paper, and offers, but is not allowed, to do so by reason of the absence of the paper or some other cause, relieves such payor from liability for future interest and costs if he keeps his offer to pay good. Independent of possession of the paper for collection at the time and place of payment, as regards the payor's rights the mere naming of such place for payment in the paper has no other significance than that named. *Ward v. Smith*, 7 Wall. 447. The result is that if a payor of commercial paper, before its deposit for collection where made payable, leaves money there to take it up it remains his property till the note is so deposited, and if such money be lost in the meantime the loss will fall on him. *Cheney v. Libby*, 134 U. S. 68.

It is further suggested to support the judgment that the respondent paid $531 on condition of a satisfaction of the mortgage being given in return. It is a sufficient answer to that, as appellant's counsel says, that the amount alleged to have been conditionally paid was due to the appellant. It was not offered as a compromise of a disputed amount, as there was no dispute whatever but that the amount offered was actually due. No part of the disputed amount was paid or offered. The $531 was paid, not as a compromise, but to put respondent in a wrong, rendering him liable to the statutory penalty for failing to satisfy the mortgage. Necessarily, the intention of the appellant was to make an unconditional tender of the amount supposed by him to be due upon the note and mortgage.

So it follows that no cause of action whatever, on any theory, was established against the appellant by the evidence. There was a motion for the direction of a verdict in appellant's favor at the close of the evidence, and it should have been granted.

*By the Court.*— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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RUGGLES, Respondent, vs. TYSON and others, Appellants.

*May 18 — June 22, 1899.*
*October 24 — November 7, 1899.*

*Equity: Parties: Estates in land: Sale: Judgment: Preservation of property according to scheme of settlement: Contingent interests: Powers: Extinguishment: Jurisdiction: Pleading: Relief: Appeal.*

1. The owners in being of real estate, for all the purposes of litigation affecting the jurisdiction of the court to deal with the whole title, stand not only for themselves but for all that may come after them; and, generally speaking, persons in being having only contingent interests are deemed to be represented by the owners of the precedent estate of inheritance.
2. By a deed reserving a life estate in the grantor, city lots were granted as follows: After his death, remainder to his daughter during her life, with power to distribute the same by will to her children living at her death and the children of her deceased children, and remainder in fee to such children and grandchildren in case of her failure to exercise the power; in case of the death of the daughter without leaving children or grandchildren, remainder to her mother for life, and remainder over, after death of the mother, in fee to the heirs at law of the grantor. Some time after the grantor's death the daughter brought suit to obtain authority to sell a part of the lots, including all estates therein, on the ground that such a sale was necessary in order to prevent a threatened destruction of such estates by tax and other liens thereon due to the improvident management of the plaintiff. Plaintiff's children (who were minors) were made parties; her mother had quitclaimed to her; and there were no other lineal descendants of the grantor, and no collateral heirs so far as known. *Held*, that the judgment of the court and its execution would act upon the whole title to the property, binding all persons having vested or contingent interests therein, present or future.
3. In such a case the court should intervene only for the purpose of preserving the property, and should disturb the scheme of the grantor only so far as may be necessary for that purpose. Its judgment should not go beyond providing for a sale of a part of the property to create a fund out of which to guard against the dangers menacing the title in remainder, and for such investment of the residue of the fund and such disposition of the property unsold as will prevent a recurrence of such dangers and as far as practicable remedy

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the impairment of the estate caused by the improvident management of the life tenant.

4. The necessities of the children will not justify, in such a case, a disturbance of the scheme of the grantor, because their interests in the estate may never ripen into an absolute title or property which they will be entitled to enjoy. In no way, even if such children were of full age and the life tenant should surrender her power of appointment under the deed, could the parties, without the aid of the court, sell the property absolutely so as to cut off the rights of those contingently interested therein.
5. Whatever the necessities of the parties may be, the court cannot break in upon the estate in remainder to relieve them, and cannot sever the life estate from the residue of the title unless it appears that there is no other practical way to administer the property under the circumstances.
6. The jurisdiction of the court in such a case to grant relief by providing for the preservation of the property is not limited to the adoption of the specific methods of relief prayed for in the complaint, even in the absence of a general prayer for relief; nor is the power of the court in respect to the subject of the action limited by any particular object which may have been in view in its institution.
7. The property involved in such action is the whole property constituting the estate, not merely that part which plaintiff asks to have sold, and the subject of the action is the preservation of the entire estate for those entitled to it under the scheme of the grantor.
8. On a general appeal from the judgment of the trial court in such a case the appellate court is not confined to an examination of the errors assigned, but may examine and correct the judgment in every respect where legal principles have been violated to the prejudice of the appellants or those whom they represent, so far as such violations clearly appear from the record.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

Equitable action by the owner of a life estate in certain valuable real property in the city of Milwaukee against her minor children, the owners of the estate in remainder subject to some contingencies, to obtain judicial authority to sell a part of such property, including all estates therein, vested or contingent, upon the ground of a necessity so to do in order to prevent a threatened destruction of such es-

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tates by tax and other liens thereon. Proper proceedings were taken to give the court jurisdiction of the infant defendants and have them properly represented by a guardian *ad litem*. The facts set forth in the complaint are covered by the findings of fact, and the prayer for relief by the conclusions of law, filed by the trial court, which are in substance as follows:

Plaintiff's father, November 19, 1874, conveyed the property described in the complaint to trustees by deed, upon the following trusts: For the sole use of the grantor during his life; after the death of the grantor, remainder to the sole use of his daughter, the plaintiff, during her life, with power to distribute the same by her last will, in her discretion, to her children living at her death and the children of her deceased children, and remainder to such children in case of her failure to exercise the power, the trustees to convey in fee in accordance with such execution if it shall take place, otherwise to plaintiff's children living at her death and the children of any deceased child, the latter to form a class to take the share of their deceased parent by right of representation; in case of the death of plaintiff without leaving children or grandchildren, remainder to her mother for life, and remainder over, after death of the mother, in fee to the heirs at law of the grantor. The grantor died soon after the making of the trust deed.

In 1883 plaintiff was married to Benjamin H. Tyson, with whom she lived till 1895, when she was legally separated from him. There were born to plaintiff, by said marriage, defendants *Virginia C. Tyson* and *Juliet C. Tyson*, both under the age of fourteen years at the date of the findings. After the divorce plaintiff was married to George H. Ruggles, with whom she now resides at Pittsburg, Pennsylvania, and by whom she has one child, the infant defendant *Anna C. Ruggles*. Plaintiff is the sole lineal descendant of her father, and there are no collateral heirs so far as known.

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Plaintiff's mother has duly quitclaimed her interest in the property to plaintiff.

Plaintiff came into possession of the property in 1882, at which time it yielded revenue sufficient to pay the taxes and support her. In 1883, soon after plaintiff's marriage with Tyson, he was permitted to take absolute control of the property, and that situation continued down to 1891, during which period, through plaintiff's inexperience, poor health, living far from the property, and confidence in Tyson, she confided the entire management thereof to him. He was an extravagant, improvident person, and so managed the property as to incumber plaintiff's life estate with leases made in such a way as to secure to himself as much immediate cash as possible, without regard to the interests of the life tenant or the owners of the estate in remainder. Some of the leases were made to run as late as 1916, the entire rental being obtained by Tyson in advance and squandered. Since 1891 plaintiff has managed the property, during which time the taxes have so increased that she has been obliged to, and has, incumbered her life estate to obtain money to pay them and to maintain herself and children, with the result that the income from the property is now only about sufficient to pay the interest on such incumbrances. The proceeds of all such incumbrances have been used to pay taxes on the property and to support herself and her children; and there are yet unpaid taxes of about $4,000 which plaintiff has no means to pay, she having exhausted her life estate in the manner indicated, and also exhausted every other resource within her reach. The value of the fee of the property is about $150,000. The owners of the estate in remainder have no property out of which they can be maintained, or out of which the taxes on the property can be paid. There is no way to save plaintiff's life estate, or the interests of those in remainder, vested and contingent, except by a sale of some part of the property, which cannot be

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made to advantage unless the entire title can be conveyed to the purchaser. Plaintiff has paid out upwards of $5,000 in maintaining and caring for her children, and she has no resources out of which to continue such care. Lots 4, 6, and 7, in block 127, and lot 15 of block 120, are the most available portions of the property for an immediate cash sale. Such lots have a salable value of about $40,000; the remaining property is worth about $110,000.

The court has jurisdiction of the entire title to the property, and of all persons interested therein, or that may be interested, whether as owners of precedent or dependent, vested or contingent, estates, for the purposes of this action. Plaintiff owns a life estate in the property, and the defendants a vested estate in remainder, subject to be opened to admit future children of plaintiff, and subject to be divested by the execution of plaintiff's power to devise the property in fee to her children in her discretion, and subject further to be divested by the death of all plaintiff's children without living issue. It is not known whether there are persons to take the estate in case the contingency shall arise upon which it will go to the heirs at law of plaintiff's father, nor is it necessary that the facts in that regard should be known in order that the court may control the entire title. The court has power to direct a sale and conveyance of any part of the property that may be necessary for the benefit and protection of the estate, in such manner as may be deemed best, conveying to the purchaser the entire title. Plaintiff should have judgment for the sale of lots 4, 6, and 7 in block 127, in the Second ward of the city of Milwaukee, and lot 15 in block 120 of such ward, for the purposes of this action. A person should be appointed trustee to make the sale under the direction of the court and convey the property to the purchaser. The expenses, costs, charges, and disbursements, past and future, in any way connected with the action, should be paid out of the general fund. The value of the

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plaintiff's life estate should be computed according to standard annuity tables, out of which the trustee should see that all tax claims of every nature are paid. The value of plaintiff's life estate, less the disbursements for tax liens, and $5,000 for past care and maintenance of the two oldest minor children, should be paid to the plaintiff. The balance of the fund should be invested for the defendants according to their interests therein, *Virginia C.* and *Juliet C. Tyson* being each charged with $2,500 paid to plaintiff. The sums so invested for the benefit of the defendants should be disbursed, principal and interest, as the court may from time to time direct.

Judgment was entered accordingly with appropriate details for carrying out its provisions. From that judgment the defendants appeal.

For the appellants there was a brief by *Rollin B. Mallory*, guardian *ad litem* and general guardian, and *Edward S. Bragg*, of counsel, and oral argument by *Mr. Mallory*.

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *T. W. Spence*.

The following opinion was filed June 22, 1899:

MARSHALL, J. There does not appear to be any serious, if any, controversy between the parties to this cause. While the attitude of counsel for appellants and respondent is in form adversary, all appear in fact to contend for a declaration by this court that the judgment appealed from is right and binding upon all persons interested in the property and that a sale of it made pursuant to such judgment will entitle the purchaser to an absolute title in fee simple thereto. No question seems to be raised by the learned counsel who appears as guardian *ad litem* for the infant defendants but that the judgment rendered was proper, but he deems it important that a final adjudication by this court should be had as regards the binding force of the decree

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upon persons not before the court otherwise than as represented by those in whom the immediate estate in remainder is vested, in order that the property may be sold under such circumstances that the price obtained will not be affected by any suspicion as to whether the purchaser will take a full title thereto. In that counsel for respondent agree. Notwithstanding the harmony indicated, in view of the fact that the defendants are infants and the title vested in them, in whole or in part, may go over to persons not now in being, the examination of the result in the court below must include the subject of whether the proper judgment was rendered on the facts found, both as to its binding force on all persons having vested or contingent interests in the property, and as to the disposition of the proceeds of the proposed sale.

As to whether the judgment acts on the whole title, it is considered that the owners in being of real estate, for all the purposes of litigation affecting the jurisdiction of the court to deal with the whole title, stand not only for themselves, but for all that may come after them. The rule is universal, and, generally speaking, persons in being having only contingent interests are deemed to be represented by the owners of the precedent estate of inheritance, for the purposes of litigation. To that general rule there are some exceptions not necessary to be noted in this opinion, as they do not apply to this case. The owner of the life estate here, and the owners of the estate in remainder, all being parties, the judgment of the court and its execution will act upon the whole title to the property, binding all persons having vested or contingent interests therein, present or future. It is often said that such is the rule as a matter of convenience or necessity, but suffice it to say that it is a rule of law as inflexibly binding upon property in lands as any principle that has received judicial sanction so long as not to be open to question. Calvert, Parties, 48; Mitford, Pl.

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173; 2 Spence, Eq. Jur. 707; 1 Smith, Ch. Pr. 92; Story, Eq. Pl. (Redf. ed.), § 144; Barb. Parties (2d ed.), 488–9; *Nodine v. Greenfield*, 7 Paige, 544; *Mead v. Mitchell*, 17 N. Y. 210; *McArthur v. Scott*, 113 U. S. 340; 17 Am. & Eng. Ency. of Law, 728; *Hale v. Hale*, 146 Ill. 227; *Gavin v. Curtin*, 171 Ill. 640; *Kent v. Church of St. Michael*, 136 N. Y. 10; *Kirk v. Kirk*, 137 N. Y. 510.

As to whether the judgment improperly disturbs the suspension of the power of alienation as to the property in question, the creator of the life estate for plaintiff and the estate in remainder for her children had an undoubted right to place the title to his property beyond the power of any person acting for the owners of the estate in remainder to prevent it going to them *in specie*, and his wishes in that regard must be carried out so far as possible. It is not doubted but that the powers of a court of equity are ample to prevent the destruction of the estate in remainder under the circumstances of this case. Rather than that the scheme of the creator of such estate shall entirely fail by reason of some circumstance not foreseen by him and provided for, the court may intervene, but only for the purpose of preserving, and so far as necessary to preserve, the property. If it cannot be preserved in the form intended, it may be preserved in its equivalent. It is not the interests of those in remainder, as such interests may appear to the court, that are to be considered and conserved, but their interests as the creator of the estate in remainder provided for them. So the fact, if it be a fact, that it would be for the best interests of the infant owners of the estate in remainder to allow them an immediate benefit therefrom to maintain and educate them, does not warrant a disturbance of the scheme intended to postpone such benefit to a later time. It is the necessity that something shall be done to guard against the danger that the title in remainder may be prevented from reaching

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defendants in possession at all, which calls into activity the equity power of the court.

In *Bofil v. Fisher*, 3 Rich. Eq. 1, upon which much reliance is placed by respondent's counsel, whether the court possessed equity powers to act under such circumstances as we have in this case, was considered and decided in the affirmative. True, it appears by the statement of the case and some things said in the opinion, that in adjudging the sale in the court below and affirming the judgment on appeal the interests of the life tenant and of the owners of the estate in remainder, as regards immediate enjoyment of the subject of the suit, was considered, but the sole question presented and decided on appeal was whether the court possessed power to bar, by its decree, the unborn and absent contingent remaindermen. No question as to the proper distribution of the fund arising from the sale was considered or decided.

In *Hale v. Hale*, 146 Ill. 227, the court decided, in effect, that for the purpose of preserving the estate for those ultimately entitled thereto, the court could authorize the conversion of property of one kind into that of another, and the holding of the latter as the equivalent of the former. In *Gavin v. Curtin*, 171 Ill. 640, also cited by respondent, a case quite similar to the one before us, the court directed a sale of the property for the purpose of preserving the estate of the life tenant, and that of the remaindermen as well, from being divested by tax liens and a mortgage to which both estates were subject, it appearing that the income from the property was not sufficient to keep down the interest and taxes, and that the improvements were likely to go to waste for want of necessary repairs. The power of equity to furnish an adequate remedy to meet the necessities of the situation was held to be beyond reasonable controversy, but that the remedy in such case should be adapted to the preservation of the property and be limited to that. In such

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an emergency the court is required to stand in the place of the creator of the estates, and do what he would have authorized had he anticipated the exigencies rendering some change in his scheme necessary in order to prevent the loss of the subject of it.

Probably no case can be found that goes further than those referred to. The rule they recognize being one of necessity, its scope is obviously limited by the purpose which calls for its application, that of preserving the subject and title of the estate. For that purpose the scheme of the creator of the estates may be invaded and varied by changing property which in one form is liable to be lost, into another form not subject to that danger, the property in its new form to be devoted to the same use and to go in the same line, upon the same contingencies, as that for which it was taken in exchange,— not to be distributed and consumed. No necessity of preservation calls for such a remedy as consumption of the property and entire annihilation of the grantor's scheme.

It follows that the judgment appealed from, so far as it goes beyond providing for the sale of a part of the property to create a fund out of which to guard against those dangers that now menace the title in remainder, and for such investments of the residue of the fund and such disposition of the property unsold as will prevent a recurrence of such dangers and as far as practicable remedy the impairment of the estate caused by the improvident management by the life tenant, must be modified. There is no justification for distributing the proceeds of a sale as was attempted by the judgment appealed from. By such judgment the interest of the life tenant is to be computed and paid to her, whereas the scheme of her father entitles her to the income of the whole property for life, subject to those duties in respect to keeping up repairs and keeping down taxes which devolve upon a life tenant by law. The judgment authorizes the division

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of the remainder of the fund, after deducting the expenses of the litigation and the value of plaintiff's life estate, into three parts, and the immediate payment of $5,000 out of two of the shares to discharge a supposed equitable claim of the plaintiff for the past support of the oldest children. It was not intended that either of the defendants should have any part of the *corpus* of the property till it should reach them under the will of their mother or by reason of her death without devising the property. What part of the property either of the defendants will finally have is uncertain. Each has a vested interest, but it is subject to be divested by the will of the mother or be diminished by the future birth of children. To compute the value of the estate in remainder, as represented by the proceeds of the sale of the property, and make a present division of it, would be erroneous in the extreme.

Just what, from an equitable and business standpoint, looking only to the purpose to be conserved, should be done under the circumstances of this case, is by no means clear; but it is plain that nothing should be done for the purpose of a present distribution and enjoyment of the property, since it was designed to be kept *in solido* till the time for distribution fixed by plaintiff's father. The fact that she has imprudently so handled the property as to prejudice her interests and those of the defendants as well, cannot change her father's scheme in law or in equity so as to give anything more to her than he designed she should have, or give her that in a different way than he designed she should receive it, to the prejudice of the estate in remainder. She was entitled to the income of the property during her life and was bound, out of such income, to preserve the property from loss by taxes or want of repairs. Having put it out of her power to perform such duty, and demonstrated most clearly that the interests of those to come after her should be guarded by a stronger hand, the necessity of fortifying

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against the recurrence of the present difficulty is quite as important as overcoming such difficulty. Before the commencement of this action plaintiff incumbered her life estate to such an extent that the interest on the mortgage indebtedness absorbs the entire income from the property, leaving nothing with which to pay the taxes. If she used the income to keep down taxes she was liable to lose her life estate by the enforcement of the mortgages; if she used the income to keep down interest on the mortgages, and let the taxes go, she was liable to sacrifice the whole estate. In meeting that situation it is deemed best that the mortgages on the life estate should be controlled by investing so much of the fund as may arise from any sale that may be made as shall be necessary to buy them in for the benefit of all persons interested in the estate, the amount so used to be returned to the fund as fast as can be from the future income from the property, the end to be attained being to preserve the property *in solido* till the termination of the life estate. The entire fund created by the sale of any part of the property, so far as practicable, should be preserved in lieu of such part. The necessary use of some of the fund to pay such expenses of the litigation as plaintiff ought to pay, or to pay the taxes, should be returned to the fund as fast as practicable out of the income, keeping in view that such fund should be held to the same use and subject to the same final distribution as the benefactor intended. It is considered that the end which the decree should aim to secure can be most certainly accomplished by vesting the title in fee, and the control of all the property, that to be sold and that not to be sold as well, in a suitable trustee, to be hereafter administered under the direction of the court; that the trustee should be required to give a suitable bond to secure the faithful performance of his duties, as indicated in the judgment appealed from; that the property directed to be sold by such judgment should be sold as therein indicated; that

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out of the proceeds of the sale there should be paid appellants' costs, disbursements, and expenses in this litigation, such part as are taxable as costs against respondent to be charged to her by the trustee to be subsequently repaid as hereafter indicated; that there should also be paid and charged to respondent, to be returned as hereafter indicated, all outstanding tax claims against the property; that any lien or lienable claim on the estate in remainder should be paid from the fund, permanently reducing it that amount; that the balance of the fund should be invested, first, by buying in for the benefit of the fund the mortgage incumbrances placed on respondent's life estate before this action was commenced, with the indebtedness secured thereby; and that the residue of the fund should be invested in good interest-bearing securities subject to the approval of the court. The trustee should disburse the income from the invested fund, and the rents from the remaining realty, first, by paying current expenses of administering the trust, and taxes, and insurance; second, by adding to the invested fund the amount of the charges against plaintiff for taxes and other matters paid for her account; third, by freeing the invested fund of the indebtedness of plaintiff, secured by the mortgages on her life estate; fourth, by paying the balance to respondent. The result will be that after the invested fund shall have been increased to the amount paid for plaintiff's account, and be freed from her indebtedness secured on her life estate, the entire income from the invested fund, and the remaining real estate as well, less sufficient to keep up repairs and taxes and pay for administering the trust, will go to the respondent. She will have the benefit of the entire income from all the property, as was originally designed, but such income will be devoted to the discharge of her obligations to the property till they shall be extinguished.

*By the Court.*— The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment in accordance with this opinion.

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The respondent moved for a rehearing.

In support of the motion there were separate briefs by *Edward S. Bragg*, of counsel for the infant defendants and guardian, and *T. W. Spence*, of counsel for the respondent.

The motion was granted September 26, 1899.

The cause was reargued October 24, 1899.

*Edward S. Bragg* and *Rollin B. Mallory*, for the appellants. [No brief on file.]

*T. W. Spence*, of counsel, for the respondent.

The following opinion was filed November 7, 1899:

MARSHALL, J. A rehearing was granted in this case on one question, namely, What is the most practicable and just method, from a business standpoint, conformable to the law as settled in the decision rendered, of saving the estate from loss without unnecessarily varying the plan of the grantor under which all parties claim? It needs but little attention to the language of the question to discern that the result of the motion for a rehearing was to leave the legal principles, upon which the decision of the court was grounded, irrevocably closed. Nevertheless counsel for appellants assumed the privilege of going into the whole case in the reargument, and were permitted to do so; and while what we may say now outside of the question for consideration cannot affect the result, because of the importance of the subject reference will be made to some of the learned counsel's contentions.

It is said that the only property involved in the action was four lots, not the whole property constituting the estate; that the primary object of the action was to obtain an adjudication respecting the power of the court to authorize a sale of real estate circumstanced like that in question, so as to bar possible remaindermen; that the remainder, after the expiration of the life estate, is vested in the appellants; that if they were of age they could sell such remain-



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der without the aid of the court, and that the life tenant can do the same; hence the court went beyond the scope of the action in laying hold of the entire property and administering it.

In the first place the court is by no means bound by the object or objects in view in instituting an action, except so far as such objects are legitimate from a legal standpoint. If there be one object which is legitimate, and it be sought for the purpose of carrying out others not legitimate, however praiseworthy be the motives from a philanthropic or moral standpoint, especially if such other objects affect the interests of infants or persons unknown who are liable, on the happening of a possible contingency, to be interested, it is not only proper, but it is the duty of the court, to so guard its decree upon the primary question, that the effect of it will be in all respects legitimate. It is not within the power of counsel for one party, or both acting together, to tie the hands of the court in the exercise of its equity powers to effect justice as to any question coming within the scope of any subject presented for consideration and decision.

In the second place, the subject of the action, not any particular object counsel may have had in view, fixed the limits of the field which the court had to investigate. What was that subject? The sale of any particular lot or lots? Certainly not. Obtaining money to satisfy the personal necessities of the respondent and her children? Certainly not. The power of the court to sell real estate of minors and use the proceeds for their maintenance? Not that. Yet the several questions mentioned have been repeatedly pressed upon our attention, both to support the judgment appealed from and obtain a change of the directions of the court as to the proper decree. The subject of the action was the necessity of a change in the form of property the title and use of which was vested for life in one person who appeared as plaintiff, and the residue of the title was vested

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in other persons, made defendants as representing such residue for all parties who might on any contingency be entitled thereto upon the termination of the particular estate. Concurrent action of the parties in whom the title was vested, without the aid of the court, could not pass a full marketable title to the property; and that seemed to be necessary in order that a part of it at least might be sold for a full value and sufficient of the proceeds used to pay off liens which jeopardized the interests of all parties. The complaint spread before the court the condition of the estate, confessing but excusing, so far as intentional wrong-doing was concerned, guilt of waste by the life tenant, setting forth the dangers which her management had created and which threatened to take the estate away from all interested under the common benefactor; and her inability, unaided by the court, to successfully cope with the situation. The court was asked to exercise its extraordinary powers by taking hold of the entire property and applying an effective remedy. Specific methods of relief were suggested and prayed for, going more to the use of the property so as to remedy the necessities of the unfortunate plaintiff and her children than that of saving the estate from destruction. The court was by no means bound to grant relief by adopting such methods, or dismiss the action, even in the absence of a general prayer for relief. The preservation of the entire property was the subject to be dealt with, so the life tenant, in her bill, prayed, among other things, that the court would do what in its judgment might seem meet and agreeable to equity. That expressly placed the entire title to the property under the control of the court, as it was any way, from the very nature of the action and of the facts. While the principle, that the court has power, by an action *in rem*, to preserve property under such circumstances, disregarding the mere form of it when that appears to be necessary, was invoked, that special jurisdiction seems to have

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been entirely lost sight of in the effort to convert the property into money and use the proceeds to alleviate, in part, the pressing necessities of the parties to the action.

In the third place, it is not true that if the appellants were of age they could sell the estate without the aid of the court. They could sell their interests in the estate, that is all. Such interests may never ripen into an absolute title or property the appellants will be entitled to enjoy. That does not seem to have been appreciated, hence the pressing necessities of the respondent, in fact of all the parties to the action, have been urged as a justification for disturbing the scheme of the settlor of the estates by taking property for the benefit of the appellants, and of the respondent as well, which does not now, and may never, belong to either of them. Who can now point to the person who will ultimately be entitled to the estate in remainder? What can justify such judicial proceedings as that of taking and using part of it for the benefit of a mere trustee of the title, who, by the happening of any one of several possible contingencies, may be divested of such title and it be vested in another with absolute power of enjoyment and disposal? This court has no such power. It may bar remaindermen as to the particular thing, but cannot extinguish their rights in the equivalent of the property. This is not an action for the adjudication of the rights of either party, represented before the court, in the title to the property, but an action to authorize the preservation of it in the form of an equivalent of property in some other form.

If it were true that if the appellants were of age they, joining with the life tenant, could dispose of the entire property absolutely, the simple question before the court would be whether it is for the best interests of the appellants that their property should be sold and a part of it used for their benefit during their minority. To support the power of a court of equity to do that, no reference to judicial au-

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thorities reaching back a century would be necessary, inasmuch as it is amply provided for by statute.

It is said the only relief prayed for not covered by statute is the right to apply the proceeds of the estate in remainder to relieve the necessities of the minors, and to reimburse the respondent for money paid out for their use over and above her income from the life estate; that in the action she tendered a surrender of her power of appointment under the settlor's deed, and that by such means the several estates can be united and sold and the proceeds appropriated, as held by authorities, ancient and modern. On the first part of the proposition, as we have seen, the scope of the prayer for specific relief in the complaint by no means limits the jurisdiction of the court. On the facts found and the pleadings, the trial court pronounced judgment. A general appeal from that judgment presented to this court the question of whether it was proper on the undisputed facts. Judicial inquiry was not, by any means, circumscribed by the assignment of errors. It was and is limited only by duty to examine and correct the judgment in every respect where legal principles were violated to the prejudice of the appellants or those whom they represent, so far as such violations clearly appear from the record. Appellants are minors standing as the mere representatives of a title liable to pass out of them to others in spite of anything they or the life tenant or the court can possibly do. On the second part of the proposition under discussion, it must be said that we are not acquainted with any authority, ancient or modern, to support it. Those cited to our attention do not apply, and it is firmly established, both at common law and by statute, that a special power, to be executed by will, cannot be executed in any other way, or be released or extinguished so as to cut off a taker not participating in the extinguishment and who is entitled to take in case the power be not executed in the manner provided by the donor of the power. The power

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may be extinguished by a conveyance by the donee and life tenant to the holders of the estate in remainder in respect to whom such donee has the power of appointment so as to give a preference of one over another; or it may be extinguished by the holder of the life estate joining with the holders of the estate in remainder in a conveyance to a third person; but the effect of such a circumstance is by no means so far-reaching as to give the vendee under the joint deed a greater title than that possessed by the vendors. If such title be defeasible, the title of the vendee will be subject to the same infirmity. If the title be liable, upon the happening of a contingency, to go over to other persons, their interests will not be affected by the conveyance. The latter circumstance, which controls the situation dealt with in this case, is what makes the proposition urged upon us unsound and the authorities cited to support it not applicable. We may conclusively point what is here said by a brief reference to such authorities.

In *Matter of Bostwick*, 4 Johns. Ch. 100, the proposition decided was that when the income of a sum of money is devised to a mother, and the principal sum after her death to her children, the property may, by permission of the court, be broken in upon and used in part for the present education and maintenance of the children, and to pay debts previously contracted by the mother for their past maintenance, where there is an actual necessity therefor that cannot otherwise be satisfied. It will be noted that the title to the principal sum in remainder, in that case, was in the children absolutely. To support the decision, *Harvey v. Harvey*, 2 P. Wms. 21, was cited, where it was said "the Master of the Rolls declared that where a legacy was given to an infant payable at twenty-one, *without any devise over*, the doctrine indicated was proper."

In *Matter of Burke*, 4 Sandf. Ch. 618, the facts were that two infant children, living with their father, had an annual

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income consisting of the use of $60,000, the principal being vested in them contingent upon their reaching the age of twenty-one, otherwise in the survivor of them, and if neither reached such age, then over to the brothers of the mother and their issue. The question was how much the father, who possessed but a moderate income, ought to have out of the income belonging to the children toward their support and education. No suggestion is found in the opinion of the court of a right to break in upon the principal sum, which was conditionally vested in the daughters. In *Wooten v. House* (Tenn. Ch. App.), 36 S. W. Rep. 932; *McKnight's Ex'rs v. Walsh*, 23 N. J. Eq. 136; *Wilkes v. Rogers*, 6 Johns. 566; and *Billingsley v. Critchet*, 1 Brown, Ch. 268, the infant child or children had a fortune absolute. There was no devise over, or right of survivorship. It was held that the necessities of the children might be supplied out of the property.

It will readily be seen from the foregoing brief analysis of authorities that they do not touch the question under discussion here. The distinction between such question and the one we have decided here is clearly pointed out in numerous English cases, holding that if there is an estate with a devise over which may take effect on a contingency, such estate cannot be used for the benefit of the precedent holder without the consent of the contingent devisee or vendee. *Greenwell v. Greenwell*, 5 Ves. 194; *Fairman v. Green*, 10 Ves. 45; *Lomax v. Lomax*, 11 Ves. 48; *Errington v. Chapman*, 12 Ves. 20; *Errat v. Barlow*, 14 Ves. 202. In *Greenwell v. Greenwell*, the object was the same as that sought here. The title was in the grandchild to be preserved and, with the accumulations, paid to him on his arriving at the age of twenty-one, and with like limitations over to his sisters in case of his death under that age. The father was dead and the children sorely in need of assistance because of the character and circumstances of the

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mother. The Lord Chancellor remarked, "I fear if I should make a decree it would be my will and not that of the testator's." In view of the pressing necessities of the case it was decided to make the order prayed for *conditional upon consent being given by all persons who would be contingently entitled to the property.*

In *Fairman v. Green*, the Master of the Rolls said on the same subject, "The court has not done this except where all the parties who are to have maintenance were equally interested, and if there was a legatee over the court has always taken the consent of such legatee."

Again in *Lomax v. Lomax*, the Lord Chancellor said: "If all die under twenty-one and a child not yet in existence should come into existence and attain that age, that child clearly would take the whole, therefore I may give it to those children (if I grant the prayer) who may never become entitled to it." And in the same line, in *Errat v. Barlow*, the conclusion was stated, in effect, thus: 'If the chance of surviving is equal among all the members of the class, and there is no other interested that upon any contingency can take that will be prejudiced, maintenance, when necessary, may be allowed, but it is impossible to give it where, in any event, the property may belong, ultimately, to other persons.'

The foregoing is the settled law as far back as we find adjudicated cases on the subject. They are in accordance with reason and common sense. Any other doctrine would sanction confiscation and render it impossible to settle an estate upon any plan that would, in any reasonable probability, be carried out according to the scheme of the settlor. A failure to keep in mind the distinction between taking the property of an infant and expending it for his benefit, and taking property to which such infant has a mere naked legal title, which may go over in possession and enjoyment to some other person, is what has led to most of the difficulties

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in this case. It must not be forgotten, at any step in this litigation, *or in administering the final decree that shall be rendered*, that plaintiff has but a life estate, coupled with a power of appointment by will to say how the estate in remainder shall be divided between her surviving children in whom the immediate estate in remainder is vested, in case she leaves surviving children, such children to take equally if the donee of the power fails to execute it, and the estate to go over to others specified by the settlor in case of there being none of the immediate remaindermen to take. While that is a special discretionary power which, by the rules of the common law, may be separated from the life estate, the settlor having failed to provide clearly to the contrary, or extinguished as to any person interested by a conveyance by such person or by a joint conveyance by such person and the life tenant to another (Lewin, Trusts (10th ed.), 725; Pingrey, Real Prop. § 1124; 2 Washb. Real Prop. 308, 309), it cannot be extinguished so as to cut off persons not participating, or executed at any other time or in any other manner than that indicated by the settlor. When authority to execute a power by will is given, it is exclusive, by the rules of the common law as well as by statute. Pingrey, Real Prop. 1118; 1 Lewin, Trusts (ed. 1888), *616; 2 Perry, Trusts, § 511*b*; sec. 2146, Stats. 1898.

Finally, we are referred to *Ex parte Yancey*, 124 N. C. 151, as conclusive — so far as the decision of the highest court of one state can be considered conclusive on a question in the courts of another state — on the point that the life tenant and the holders of the title in remainder may, joining, convey the title, notwithstanding the future birth of a child may add to the class entitled to take under the deed or will after the expiration of the life estate. A moment's examination of the case shows that the court only held that where all the remaindermen in being are before the court, a sale of a full title may be authorized though

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there may be possibilities as to others being ultimately entitled to participate in the avails of the property as members of the class, the property, however, to be preserved in its new form for the benefit of those ultimately entitled thereto. That is what was decided in this case. The North Carolina court, however, held that where there is a right of survivorship, as here, between members of a class, the court cannot authorize a sale at all, because the ultimate takers in that event cannot be known. That doctrine, applied here, would defeat the whole object of this litigation; but that it is wrong in part seems clear, and is demonstrated by several well-considered cases cited in our former opinion. There is no good reason for saying that the court may authorize the sale of lands where the title in remainder is vested in a class which is subject to open and let in new members, but cannot if the scheme laid in the will or deed be such that members of the class may drop out and their interests go to the surviving members thereof. The theory, as before indicated, upon which the court takes jurisdiction, is that the proceeding is *in rem*, and that those having the vested interests stand for those having contingent interests. In that view, whether there be a contingency which will increase the class, or one which will decrease it or extinguish it altogether, should make no difference, since it is the *res* that is being dealt with and is to be preserved unimpaired in value for the ultimate taker or takers. However, it is the settled doctrine in North Carolina that a court of equity has no power to authorize a sale of property held by a title which may be divested by the happening of some contingency and the title thereby be vested in another not in being or that cannot be known. *Justice v. Guion*, 76 N. C. 442; *Watson v. Watson*, 3 Jones, Eq. 400; *Williams v. Hassell*, 74 N. C. 434. It will be noticed, in examining these cases, that the only power of the court suggested was to convert property from one form into another for the pur-

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pose of preserving it or to increase its value, not distributing it so as to prejudice the possible remaindermen; and even that was denied where the property was held by members of a class with the right of survivorship in case of a member dropping out by death.

The foregoing review of authorities cited by counsel to support the contention for a decree allowing a partial distribution and consumption of the property in question, and citation of authorities to the contrary, with what was said in the former opinion, we apprehend, show clearly the soundness of the conclusion which was reached.

When the danger of loss to the estate shall have been securely fortified against, there is no reason why the equivalent of any of the property that shall have been sold, and the unsold lands, should not be used so as to provide for the respondent and her children so far as such provision may be consistent with a certain preservation of the property for the ultimate takers upon the expiration of the particular estate. Whatever the necessities of the parties may be, the court cannot break in upon the estate in remainder to relieve them, and cannot sever the life estate from the residue of the title unless it appears that there is no other practical way to administer the property under the circumstances. The fact that where by a deed or will the life tenant and the remaindermen are left free to convey the entire title, in case of a sale made by order of the court the value of the life interest may be computed upon the basis of the expectancy of life of the life tenant and paid over to such tenant, is not very persuasive in a case like this where the interests of the parties are not separable without a clear violation of the expressed will of the common benefactor. While the life tenant, in the instant case, is competent to sell her interest so as to separate it from the power of appointment, she has no authority to separate her estate from the estate in remainder,

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and she should not be given that power by the court without some overpowering necessity existing to demand it, because that course would substitute a mere expectancy for a certainty, contrary to one of the most important features of the settlor's scheme. The firm adherence of the court to the legal principles indicated is by no means inconsistent with anxious solicitude to relieve the misfortunes of the parties to this action so far as power exists in the court to do so, and that solicitude has been entertained here from the first. The situation mentioned, however, cannot obscure the fact that the respondent is responsible, before the law, for the dangers which necessitate the change in the property in question which has been directed by the court. The decision of the cause, with directions made to remedy the dangers which exist and guard against a recurrence of similar dangers in the future, was intended to be for the best interests of all concerned so far as such interests could be legally conserved.

The directions made as to the decree to be rendered in the court below were not intended to, and did not, differ from the judgment appealed from so far as relates to the mere machinery of selling and conveying the property. That whole subject, as well as the handling of the proceeds of the sale, within the limits of the plan outlined by the decision, was left expressly and plainly to be administered by the trial court. There is nothing in such decision preventing a new loan upon the life estate by permission of the trial court under the directions of the trustee for the purpose of taking up incumbrances bearing a high rate of interest, bought in for the benefit of the estate, or preventing a reduction in the rate of interest on such incumbrances if found to be too high, or changing any mere matter of administration so far as the same relates to the making of a proper deed to carry out the sale, if one shall be made. So in respect to the matters

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referred to, no modification in the decision heretofore made by this court is needed to meet the objections raised on the reargument.

The subject of what change can properly and safely be made in the manner of handling that portion of the estate which will be represented by the proceeds of the four lots, in case of their sale, and the care of the residue of the estate, from the directions contained in the former decision, has received the most careful consideration, resulting in a conclusion that the life estate ought not to be separated from the estate in remainder, but that, if respondent desires to substitute insurance upon her life in reputable level premium insurance companies, payable to the trustee for the remaindermen at her death, in place of her liabilities to the estate, that will accumulate in the hands of the trustee by a carrying out of the directions in such decision, she may properly be allowed to do so to an amount equal to that which would go to her upon a separation of her life interest in the proceeds of the sale of the four lots, if she adequately secures the payment of the premiums upon the policies of insurance, as such premiums fall due, and also secures the remaindermen by a mortgage on her life estate in the unsold property to their trustee, the prompt payment of future taxes on the property, and that, in the event of her taking advantage of this privilege, the unsold property should be released from the trust created by the decree. It has been concluded to make an addition to the directions contained in the decision heretofore made, in accordance with these views, thereby practically adopting a suggestion made by appellants' counsel on the argument. That will result, if respondent so elects, in giving the trustee for the remaindermen, insurance for such money as may be paid out of the proceeds of the property sold, for her account, a return of the unsold property to the control of the respondent, as life tenant, and in securing to her a net income of about $1,500

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per year as the property is now circumstanced, which will doubtless be largely increased as improvident leases shall expire. No other modification of the decision of record seems advisable.

*By the Court.*— The directions for the entry of a decree in the trial court are changed, by adding thereto that such decree shall further provide, in substance, as follows: The respondent may, at her election, reimburse the estate for the money paid out for her account by life insurance on her life placed in reputable level premium insurance companies authorized to do business in this state, to the extent of such portion of the proceeds of the property sold as would go to her if the value of her life estate were estimated and paid to her; the sum so used, however, to be considered an investment of property of the estate in which respondent has a life estate, secured by the life insurance, and not a payment to the life tenant out of it, of the value of such interest. The policies of insurance shall not be accepted, however, by the trustee, unless approved by the court upon the recommendation of the trustee, and the punctual payment by the plaintiff of the premiums that shall fall due upon the policies, and the future taxes upon the unsold and all the property of the estate, be secured by the life tenant by a mortgage to the trustee upon her life estate in such property, so laid that it will be a first lien on such estate. Upon the insurance being given and accepted, under the conditions named, the unsold real estate shall be released from the trust created by the decree and the life tenant restored to the control thereof as such tenant, subject to the obligations incident to that relation to the property. Upon the insurance premiums and the taxes on all the property of the estate for any year being paid by the life tenant, the trustee shall pay to her the income of the trust fund for such year, less the expenses of administering the trust, but if she shall fail to make any of such payments, the trustee

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shall discharge the unpaid obligations out of any portion of the trust fund that would otherwise go to the life tenant, paying the residue, if any there be, to her; and if there be a deficiency, he shall enforce the mortgage security upon the life estate in accordance with the terms thereof, to recover the amount of such deficiency. No costs shall be allowed, on the rehearing, to either party, except clerk's fees, which shall be paid by the respondent.

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CORNELL, Plaintiff in error, vs. THE STATE, Defendant in error.

104 527
106 439

104 527
114 " 10
114 " 14
114 505

*October 25 — November 7, 1899.*

*Criminal law and practice: Jury: Acceptance: Waiver of objections: Murder: Information: Duplicity: Immaterial error: Evidence: Expert testimony: Hypothetical questions: Confessions: Instructions to jury: Corroboration: List of witnesses: Appeal and error: Exceptions.*

1. An unconditional acceptance of the jury, after it is complete, by counsel for defendant in a criminal case is a waiver of all objections to the manner of its selection or to the qualifications of the jurors.
2. Duplicity in an information is not a ground for motion in arrest of judgment, at least unless the crimes be of distinct grades so as to affect the character of the sentence which may be imposed therefor. If the duplicity is apparent on the face of the information it must be taken advantage of by demurrer, or motion to quash, or motion that the prosecution be confined to one offense or the other; but if it is not so apparent the defendant's rights may be protected by motion to require an election when the duplicity is first made to appear to the court.
3. An information charging the defendant with having killed and murdered two persons, naming them, does not show duplicity upon its face, since both may have been killed as the result of a single act.
4. Where no particle of evidence was rendered either necessary or admissible by the fact that the killing of two persons was alleged

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in the information, the error, if any, in overruling a motion to require an election on the ground of duplicity is immaterial, and will be disregarded under sec. 2829, S. & B. Ann. Stats.

5. Where a long hypothetical question is asked to which objection is made by the opposing party, it is the duty of counsel, both in the trial court and in the appellate court, to point out the particulars wherein the question is deemed improper.

6. Where the evidence given is not conflicting and is not so complicated or voluminous as to make a difference of understanding of material facts probable, an expert witness who has heard it all may be asked to predicate his opinion thereon, on the assumption of its truth, without rehearsing it in a hypothetical question; but unless such conditions exist a question should be put embodying the facts on which the expert is asked to base his opinion. The volume and degree of complication of testimony, however, which renders one form of question or the other proper, rests largely in the sound discretion of the trial court.

7. Where the accused was clearly guilty of wilful and premeditated murder unless he was insane and not guilty at all, a refusal to give instructions relative to the lower grades of homicide was proper.

8. Where the evidence is uncontradicted that before his arrest the defendant, after due reflection, sought and availed himself of an opportunity to make confessions of guilt, and was not led thereto by any invitation, request, threat, or promise, such confessions must be regarded as voluntary.

9. In the prosecution of a father for the murder of his two children with whom he was sleeping, it appeared, among other things, that the accused was found in the room where the children were killed, with his throat cut; that the commission of the offense by any other person was improbable; and that the bottoms of the feet of the accused were stained with blood, showing conclusively that he had been on his feet after the killing. *Held*, sufficient corroboration of a confession of guilt to warrant a conviction, if such corroboration was required.

10. The defendant in a criminal prosecution is not entitled to a list of the witnesses against him, there being no statute in this state conferring that right.

11. Error cannot be predicated on the refusal to allow the defendant to open and close the argument on the issue of insanity, unless proper exception is taken to the refusal.

12. The admission, on the trial of the issue of insanity, of testimony *prima facie* connecting the accused with the offense charged is not error, where such testimony was relevant and admissible to show conduct bearing on his mental condition.

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Error to review a judgment of the circuit court for Waukesha county: James J. Dick, Circuit Judge. *Affirmed.*

On November 19, 1897, the defendant resided with his wife and two children of their own and two of her children by former marriage, in indigent and destitute circumstances, at Oconomowoc. On that evening the defendant went to bed in one room with his two children, aged respectively six and four. Later the wife, together with a boarder, between whom and herself illicit relations, with the knowledge and consent of the defendant, are claimed to have existed, went to bed in another room. In the morning the defendant was found in bed with his throat cut, almost but not quite fatally, and the two children dead in bed, each with a blow upon the head from a hammer, fracturing their skulls, and each with throat cut fatally. His wife immediately called the boarder, who notified certain neighbors, who came with a physician. Defendant was conscious on their arrival, and, in answer to inquiries, stated, substantially, that he did not know whether he killed the children or not; that, if he did, he did not know it. Defendant's bed and bedroom were smeared with blood, as also his clothes and parts of his person, including the soles of his feet. A bloody razor was found upon the commode near the head of the bed, and a bloody hammer on the floor near the bed. *Rigor mortis* was complete in the bodies of both the children. The wife and boarder were arrested, and the defendant treated by the physician, and a nurse provided for him. There were no signs of blood elsewhere in the house, or on the persons or clothing of the wife or the boarder.

After a few days the defendant modified his statement by saying that, after reading the newspaper accounts of how things were found in the house, it seemed as if he must have killed the children; and ten days later, of his own volition, he requested his nurse to procure the attendance of the district attorney, saying that he wanted to tell the whole story,



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and thereupon did relate to the nurse his statement (which was afterwards repeated to many other persons without substantial variation), to the effect that on retiring that night he had determined to end his life, owing to his indigent condition and the illicit relations between his wife and the boarder; that he waited only until he heard them retire to the other bedroom, and then proceeded to get his razor to carry his design into effect; that, his glance falling upon the children, the thought came to him that he ought not to leave them to grow up under such circumstances, and that it was better to take them with him; that he remembered having struck his foot against a hammer as he was going to bed, and determined to use that to stun the children before cutting their throats, in order that they should not suffer; that accordingly he secured the hammer and carried out that design, first striking them each on the head, and then cutting their throats (giving details as to shifting the body of one of them so that the blood should not continue to spurt upon the wall); that then, kneeling upon the bed, he drew the razor across his own throat, and fell off the bed, which was the last memory he had until towards morning, when he became conscious and struggled back onto the bed and lay down again, where he was found. He detailed having dropped the razor, finding it in the morning; first putting it under his pillow, and afterward laying it on the commode, where it was found. He gave as a reason for desiring to make this statement that his previous statements had not, as he expected, been sufficient to relieve his wife from the charge, and that he did not want others to suffer for his act. Substantially this statement was repeated to the district attorney, Mr. Parkinson, to the deputy sheriff, and to others. The proof discloses that it was made before he was arrested, without any solicitation, threats, or suggestion of advantage from any of them, and entirely voluntarily.

Being arrested and brought to trial, he interposed a plea

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of insanity, which issue being found against him, the trial proceeded to a verdict of guilty of murder in the first degree, followed by sentence to imprisonment for life, to review which judgment writ of error was sued out from this court.

Upon the trial of the issue of insanity much evidence was offered, which, however, went little further than to disclose a somewhat weak-minded man, without malice or ill temper, addicted to drinking at various intervals in his life, and through many years addicted to self-abuse, but with the ordinary powers of understanding and reasoning as to his acts, and of guiding his conduct by his will. A situation approaching pauperism was shown, and declarations to the effect that he had surrendered his wife to illicit intercourse with the boarder as a means of sustaining his family, somewhat against her will. Other material facts are stated in the opinion.

*John A. Kelly*, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General*, and oral argument by *R. F. Hamilton*, second assistant attorney general.

DODGE, J. 1. Several errors are assigned upon the selection of the jury, which are classifiable into: (a) That the court, after 270 jurors had been drawn from the list supplied by the jury commissioners, ordered the sheriff to summon thirty from the county at large for the purposes of this case; (b) that the court denied defendant's challenge to several jurors who said upon their *voir dire* that they had formed an opinion that a murder had been committed, but not as to the responsibility of any one for it; (c) that the court overruled defendant's challenge to jurors who had been summoned upon special venire for an individual case within a year; (d) that the court sustained the state's challenge for cause to a juror who said that he had a preconceived opinion that

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any person committing suicide must be insane. After the jury was complete, and before it was sworn, the court inquired of each of the counsel whether he was satisfied with the jury, and received from each an unconditional affirmative answer. It is apparent, therefore, that under the rule last laid down in *Emery v. State*, 101 Wis. 627, the defendant is not in position to assign error upon any of these grounds. His unconditional acceptance of the jury waived all such grounds of objection, even if otherwise tenable. *Flynn v. State*, 97 Wis. 44.

2. The information, without description or enlargement, merely charged the defendant with the wilful and premeditated murder of both William Cornell and Lillie Cornell. Before any witnesses were called, even on the issue of insanity, the defendant moved the court to require the prosecution to elect between the two, which motion was overruled. After the verdict, defendant moved in arrest of judgment upon the ground of duplicity in the information, which motion was also overruled.

Duplicity consists in alleging two independent crimes in the same count of an information or indictment; and if those crimes be distinct, to the extent at least that different defenses may be interposed as to each or different evidence may be necessary as to them, the accused has a right to object and insist on their severance. This he may do, if the duplicity is apparent on the face of the information, by a demurrer, by motion to quash, or by a motion that the prosecution be required to confine itself to one or the other offense. 1 Bishop, Crim. Proc. § 442; *Fulmer v. Comm.* 97 Pa. St. 503; *Forrest v. State*, 13 Lea, 103. If he do not so object, he will be deemed to have waived the irregularity, as he has a right to do; for its effect may be not to prejudice him, but even to aid him in his defense. For this reason duplicity in the information is not a ground for a motion in arrest of judgment,— certainly unless the crimes be of distinct grades, so

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as to affect the character of the sentence which may be imposed therefor. 1 Bishop, Crim. Proc. § 443; *Comm. v. Tuck*, 20 Pick. 356; *Forrest v. State, supra.* If, however, the duplicity is not apparent upon the face of the information, obviously it cannot be reached either by a motion to quash, a demurrer, or a motion to require an election, made before the taking of any evidence. In that case it would seem that the defendant's right might be protected, whenever the duplicity was first made to appear to the court, by then moving to require an election as to which crime should be prosecuted. *Forrest v. State, supra.* In the case at bar no duplicity is apparent upon the face of the information. So far as appears from that alone, the children might both have been killed by a single act, as by a single shot from a gun, or by a single blow. *Rucker v. State*, 7 Tex. App. 549. The court therefore could not, at the time the motion was made, recognize any defect or duplicity, and properly overruled defendant's motion, which was not renewed after the circumstances of the killing appeared.

This assignment of error is also untenable on another ground. S. & B. Ann. Stats. sec. 2829, commands that this and all other courts shall, "in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." This statute is equally applicable to criminal as to civil actions. *Odette v. State*, 90 Wis. 258, 262. It is apparent from the statement of the case, and the proofs upon which the verdict was founded, that no particle of evidence was rendered either necessary or admissible by the fact that the killing of the two children was alleged in the same information. All that was disclosed with reference to the appearance of the room where the crime was committed, or of the defendant himself, the condition of the bodies, the absence of signs elsewhere in

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the house or upon its other inmates to incriminate them, and all of defendant's confessions, would have been equally admissible, and equally required, had the death of either child been alleged alone; and the punishment for the murder of either must have been the same as that for the murder of both. The utmost diligence and refinement, therefore, would fail to disclose any possible injury or prejudice to the defendant resulting from the overruling of his motion to require an election.

We have not discussed, and do not decide, whether duplicity in fact existed in this information. It is uniformly held that a killing of two or more by a single act may be alleged in one count, and some authorities go to the extent of holding the same to be true where the killing of two or more is the result of one transaction, although by different acts. The latter proposition has not been decided in Wisconsin. In *Oleson v. State*, 20 Wis. 58, a charge of aiding in the escape of two prisoners was held single, on the ground that the language used indicated a *single act*, so that but one offense was committed. A similar interpretation was deemed significant in construing the information in *Koetting v. State*, 88 Wis. 502, 506.

3. Error is assigned upon the overruling of objections to several hypothetical questions. The prosecuting attorney addressed to a medical witness a hypothetical question consisting of about 600 words, in which are cursorily narrated circumstances, conduct, and appearance of the accused, which had been testified to by one or another witness. This question was objected to generally, as not based on the evidence. No specification was made of any defect in this respect, and none is made in this court. The court below must have been, as we are, wholly at a loss to know whether defendant's counsel claims that there are elements of the question not supported by the evidence, or that material facts established by the evidence are omitted. Under such circumstances we can-

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not say that any error of which the defendant could have the right to avail himself has been committed. It is unworthy of counsel, owing a duty of fairness and aid to the courts, to urge either an objection or an error such as this. The trial court cannot be expected on the spur of the moment to correctly analyze and test the details of an extended hypothetical question, covering as it did, and as they so often do, the entire field of the evidence in the case. Nor should we be expected to search through some hundreds of pages of manuscript for omissions or mistakes which counsel declines to indicate specifically. It is the duty of counsel to point out wherein such a question is improper, and he should not be permitted to make of such an objection an unfair trap for the trial judge, to be availed of after the evidence is written out and brought to this court for review. Independently of this view, however, we do not find that the objection is well taken. The question seems to us a fair, though unnecessarily prolix, compilation of material facts on which evidence had been offered.

A serious question is raised by defendant's exceptions to allowance of questions put by the prosecuting attorney to two medical experts, who testified they had heard all the testimony except the expert testimony. The questions were as follows: "Assuming that the testimony as given by these witnesses is true, you may state whether, in your opinion, this defendant on November 19, 1897, was sane or insane." The competency of such interrogatory is not discussed at all in either brief, and counsel for plaintiff in error does not suggest it, except by reference to a page of the record. Were the case an ordinary one, where anything less than the liberty for life of the defendant were at stake, we should feel that our duty to other business of the court forbade us to supply the omissions of counsel by searching out both the error complained of and the authorities on the subject. In deference, however, to the overwhelming consequences to

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the party, we have made exception to the rule indicated in *Butler v. State*, 102 Wis. 364, that ordinarily the court will not consider assignments which counsel do not deem worthy of argument.

There are two well-established lines of decisions by this court as to the propriety of such question in this form: (1) That such question is proper where based upon the testimony of a single or a few witnesses, whose testimony is not conflicting, so that there is no likelihood that the expert witness and the jury can understand it differently. *Wright v. Hardy*, 22 Wis. 348; *Gates v. Fleischer*, 67 Wis. 504, 509; *Abbot v. Dwinnell*, 74 Wis. 514, 520; *Patry v. C., St. P., M. & O. R. Co.* 82 Wis. 408, 414; *McKeon v. C., M. & St. P. R. Co.* 94 Wis. 477, 483. (2) Such question is improper where the evidence is voluminous, elicited from a large number of witnesses, extending through several days, and not uncontradictory. *Bennett v. State*, 57 Wis. 69, 83; *Quinn v. Higgins*, 63 Wis. 664, 668; *Maitland v. Gilbert P. Co.* 97 Wis. 476, 484.

The latter rule is in part an extension of the very well settled proposition that an expert cannot be allowed to pass on the effect of evidence and thereby usurp the function of the jury, which is well illustrated and stated in *Luning v. State*, 2 Pin. 215, 220, cited by TAYLOR, J., in *Bennett v. State, supra;* the question held improper being: "From all the evidence, did the mill pond, in your opinion, cause the sickness?"—and the vice being that, before the witness could form the opinion, he must make up his mind what facts the evidence proved. *Maitland v. Gilbert P. Co.* 97 Wis. 476, 484. Obviously, if testimony of different witnesses is conflicting as to a material fact, the hypothesis of the truth of all the testimony is absurd; the witness, if he answers, must of necessity evade that hypothesis, and draw a conclusion of fact variant from the testimony of one or the other witness who is contradicted.

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The broad rule that an expert who has heard all the evidence may be asked his opinion, based on an assumption of the truth of what he has heard, is supported by a number of authorities; and the only limitation placed thereon, outside of Wisconsin, is that such testimony must be without substantial conflict, except that in *Hunt v. Lowell G. L. Co.* 8 Allen, 169, 172, the fact that it is not complicated is suggested as supporting the propriety of the question. The following are the more important and direct cases in which the subject is discussed: *Fairchild v. Bascomb*, 35 Vt. 398; *State v. Hayden*, 51 Vt. 296; *Woodbury v. Obear*, 7 Gray, 467; *Hunt v. Lowell G. L. Co., supra; Negroes Jerry v. Townshend*, 9 Md. 145; *State v. Cole*, 94 N. C. 958; *Kempsey v. McGinniss*, 21 Mich. 123; *Getchell v. Hill*, 21 Minn. 464; *State v. Lautenschlager*, 22 Minn. 521; *Storer's Will*, 28 Minn. 9; Rogers, Exp. Test. 70, 71.

From a careful comparison of the decisions of this court, the following rule may be formulated: Where the evidence given is not conflicting, and not so complicated or voluminous as to make a difference of understanding of material facts probable, an expert witness who has heard it all may be asked to predicate his opinion thereon, on the assumption of its truth, without rehearsing it in a hypothetical question; and that, unless such conditions exist, a question should be put, embodying the facts on which he is asked to base his opinion.

It is to be noted, however, that the volume and degree of complication of testimony which may render the one form or other of question proper must rest largely in the sound discretion of the trial judge. The intelligence of the expert witness, the consecutiveness and clearness with which testimony goes in, the interruptions or diversions of attention to other subjects, are all material considerations, and may well vary in different cases, and cannot so well be known to this court. The existence or nonexistence of conflict in the testi-

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mony, however, is a question answerable with substantial certainty; and if substantial conflict exist it would be error to permit a question in the form under discussion.

Applying these rules to the case before us, we find the testimony, extended over parts of two consecutive days, was elicited from some fifteen different witnesses and occupies forty or fifty typewritten pages, apart from expert testimony. It covers defendant's habits of intoxication, industry, kindliness, and the like, for some fifteen years; certain injuries to his head; an incipient sunstroke; his poverty; the details of the crime as observed the morning after; and certain conversation and conduct of defendant at and about that time. A careful examination discloses no conflict or contradiction as to any material facts. In the light of the situation thus presented, we cannot avoid the conclusion that the trial judge was within the limits of his sound discretion in permitting the witnesses to give their opinions in response to the objected questions, and that no error was thereby committed.

4. The refusal of the court to give instructions to the jury upon the lower grades of homicide was without error. The case from beginning to end is absolutely barren of any suggestion to justify such instructions. The accused, upon his own confession and upon the facts and circumstances surrounding the crime, was guilty of wilful and premeditated murder unless he was insane and not guilty at all. It would have been improper for the court to have obscured the issue to be passed on by the jury by disquisition as to the lower grades of homicide.

5. Counsel assigns error upon the reception of the defendant's confessions in evidence, citing authority to the proposition that confessions must be shown to be voluntary before they should be accepted. It is difficult to believe in the sincerity of this assignment. The confessions were made at a time when the defendant was not under arrest. The

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evidence is overwhelming and uncontradicted that they were made voluntarily, in the strongest sense of that word. The defendant, after due reflection, sought and availed himself of an opportunity to make them, and was not led thereto by any invitation or request,— far less by any threat or promise. Authority is also cited to the proposition that confessions alone should not suffice to sustain a conviction. Without passing upon the legal principle, it is sufficient to point out that the facts and circumstances surrounding the crime itself might well have sufficed to support this verdict. The accused was found in the room where the children were killed, the probability of any other person's commission of the act was negatived, and, amongst other circumstances, it appeared that the bottoms of the feet of the accused were stained with blood, showing conclusively that he had been alive and on his feet after the killing of the children.

The foregoing are all of the assignments of error which demand more than the most cursory comment. The complaint that defendant was not furnished with a list of witnesses is wholly without force, there being no rule of the common law entitling an accused thereto, and no statute in this state. Wherever that right exists, it is by virtue of express statute. Further, there appears to have been no demand, objection, or exception by reason of that omission. The error assigned, for that the court denied defendant the right to open and close the argument upon the issue of insanity, is untenable, for the reason that no exception was taken thereto and its propriety or impropriety is not before us on this record. The two instructions requested by the defendant on the issue of sanity were fully embodied in the general charge on that subject. Complaint is made upon the admission of certain testimony, *prima facie* connecting the accused with the offense, upon the issue of insanity. Whether proper or not as tending to establish defendant's guilt at that time, it was all relevant and admissible to show

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conduct bearing upon his mental condition. We have examined all of the references in brief of plaintiff in error to both admissions and exclusions of testimony claimed by him to be erroneous, and can find no error therein and no question worthy of discussion. The conduct of the trial was exceedingly liberal and favorable to the defense. In almost every instance the question of the admissibility of evidence was resolved in his favor, and he given the utmost latitude of defense. A careful examination of the record convinces us that the guilt of the defendant, as well as his mental responsibility, was overwhelmingly established, and that no error in the proceedings is presented to our attention.

*By the Court.*— Judgment affirmed.

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JENKINS and others, Executors, Respondents, vs. BRADLEY and others, imp., Appellants.

*May 20 — November 24, 1899.*

*Corporations: Equity: Parties: Action by stockholders: Issue of stock in exchange for land: Failure of title: Liability: Indemnity agreement between promoters: Fraud: Limitation of actions: Judgment.*

1. In an equitable action by stockholders of a corporation, suing as such on behalf of themselves and others similarly situated, on the ground that the governing body of the corporation refuses to proceed, only a cause of action in favor of the corporation itself, not one belonging to individual members, can be enforced.
2. Tenants in common of lands quitclaimed them at an agreed valuation to a corporation organized by themselves, in exchange for full-paid stock. As to an undivided one-fourth interest in said lands certain of the grantors had the legal title, but merely as security for a debt. This fact was known to all, but all supposed that the debtor's interest therein had been forfeited or was of very little value, and stock purporting to be full paid was therefore issued for said one-fourth interest the same as for the other interests. It is claimed that at and prior to the organization of the corpora-

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tion the grantors of said one-fourth interest agreed with another grantor, J., that they would indemnify and hold him harmless from any defect in the title to said one-fourth, and that said agreement was the consideration moving to J. for the conveyance to the corporation of his interest in the lands. *Held*, that such agreement, if made, was a personal agreement and did not inure to the benefit of, and could not be enforced by, the corporation.

3. After the organization of the corporation the debtor above mentioned established his right to redeem said one-fourth interest in the lands. Thereupon the corporation purchased his interest at a fair price, paying therefor out of the corporate funds. All the directors voted for such purchase, but it is claimed that the representatives of J.'s estate so voted upon the assurance of the other directors that said estate should not be in any manner prejudiced thereby. *Held*, that such purchase, and the refusal of the grantors of said one-fourth interest to reimburse the company or J.'s estate on account of the failure of the title thereto, did not constitute a fraud upon the corporation.

4. At the time said one-fourth interest was quitclaimed to the corporation the interest of the grantors therein was worth about $15,000, but all parties supposed it was worth the face value of the stock issued for it, which was $55,000. *Held*, that the title to the stock so issued did not fail entirely.

5. Failure of title to said one-fourth interest did not give the grantors thereof the right to return the stock issued therefor to the company and, upon accounting for the benefits received on account of such holdings, to be relieved from further obligation.

6. Having no election as to the holding of the stock issued for said one-fourth interest, the retention of such stock by the grantors of that interest and payment for the said debtor's interest therein out of corporate funds imposed no obligation upon said grantors beyond the obligation which arose from the failure of their title.

7. Although the purchaser of real property, in the absence of proper covenants, generally takes it at his own risk and has no remedy in case of failure of title, yet, if the grantors occupy a fiduciary relation to the grantee and the parties have acted in ignorance of, or under mistake as to, their antecedent legal rights, a court of equity may look into the transaction and grant relief.

8. The grantors of said one-fourth interest were promoters and directors of the corporation. All the parties supposed that, under a power of sale in the agreement with the debtor, said grantors could and did convey his interest to the corporation. In his action to redeem, said grantors set out that they had made such conveyance

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and had in their hands about $40,000 (being the difference between the amount due from him and the valuation at which said one-fourth interest had been taken by the corporation) to which he was equitably entitled. After it had been determined that they had conveyed only a mortgage interest to the corporation, they virtually admitted that they were liable to the corporation for said difference between the value of the mortgage interest and the amount of the stock issued therefor, and denied only that they were liable for the full amount paid by the corporation for the debtor's interest; and there was an understanding among the directors that the company was to be reimbursed on one basis or the other. *Held*, that said grantors were both legally and equitably bound to make good their stock on the basis of the difference between what they paid and what they received.

9. Even if the cause of action in favor of the corporation arose against said grantors when the deed was made, yet the conduct of the grantors, and their subsequent recognition of liability, in connection with all the surrounding facts and circumstances, is *held* sufficient to show an agreement on their part to pay, and to take the case out of the statute of limitations.

10. Though such liability of said grantors was to the corporation and was made to appear in an action brought by certain stockholders on behalf of the corporation, yet, all the parties interested being before the court, and it appearing that there had been individual settlements between said grantors and one stockholder and between certain of the grantors and the plaintiffs, so that it would be unjust to require the remaining grantors, who had not settled with plaintiffs, to pay to the corporation money for general distribution to the stockholders, a judgment against said grantors who had not settled and in favor of plaintiffs directly, for their share of the amount equitably due, is *held* proper, in order to prevent circumlocution and injustice.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

Prior to 1871 one James Jenkins was the holder of the legal title to a tract of about 17,000 acres of timber lands. He held in his own right a three-fourths interest, and the legal title of the remainder as a security for the payment of a loan of $10,000 to Elijah Swift, who was the real owner thereof. On October 14, 1871, Jenkins conveyed to Daniel

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Bradley and *A. P. Lovejoy* a three-fourths interest in said lands, and took back an agreement, reciting the interest of Swift, in which they agreed to convey to Swift a one-third interest in the title they received upon compliance by him with all the conditions of said agreement with Jenkins. Under the sale from Jenkins, Bradley took twelve-twentieths and *Lovejoy* three-twentieths of the entire tract. On July 13, 1872, Bradley conveyed to Asa P. and David Kelly an undivided one-third of his twelve-twentieths interest in said land, and also one half of his interest in the undivided quarter interest mentioned as belonging to Swift. On September 15, 1875, Bradley quitclaimed his remaining interest in said lands to his son *Edward Bradley*, in trust, in equal shares for his three sons, *Edward*, William H., and James Bradley. The title then stood as follows:

| | |
|---|---|
| Jenkins | 5-20 |
| Lovejoy | 3-20 |
| A. P. Kelly | 3-20 |
| D. Kelly | 3-20 |
| E. Bradley | 2-20 |
| W. H. Bradley | 2-20 |
| James Bradley | 2-20 |
| | 20-20 |

The title to the Swift interest was held as follows:

| | |
|---|---|
| Lovejoy | 3-60 |
| D. Kelly | 3-60 |
| A. P. Kelly | 3-60 |
| E. Bradley | 2-60 |
| W. H. Bradley | 2-60 |
| James Bradley | 2-60 |
| | 15-60 |

Thereafter the holders of this title formed a copartnership as Bradley Bros. & Co., and jointly conducted logging operations on said lands. Some time prior to and during the year 1882, the parties entered into negotiations among themselves for the formation of a corporation to take said lands and other lands owned by them and conduct the logging and

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lumbering business. These negotiations finally culminated in the organization of a corporation called the State Lumber Company in October, 1882. The capital stock was $500,000, with 5,000 shares of $100 each. At that time the Swift interest had not been redeemed, and neither interest nor taxes had been paid by him. The matter was talked over among the parties, and the conclusion was reached that Swift had abandoned and forfeited his interest in the land, or it was of very little value; so it was agreed that each one should convey his interest to the corporation by quitclaim deed, and receive therefor a proportionate share of its capital stock. The parties owned other lands, which were also conveyed to the corporation. The value of the so-called "Jenkins lands"—being the tract first mentioned — was agreed upon as being $222,527.55, and stock purporting to be fully paid was issued therefor, Jenkins getting five twentieths, and the other parties in proportion to their interests as above stated. The stock amounting to $55,631.89, representing the Swift interest, was issued to *Lovejoy*, the Bradleys, and the Kellys in the proportions stated. The parties named and one Benjamin Sweet constituted all the subscribers to the capital stock. The corporation was duly organized, the parties named being the directors, and proceeded to carry on a general logging and lumbering business. Jenkins died March 22, 1885, leaving a will, in which the plaintiffs in this action were named executors and executrix.

On May 5, 1886, Swift commenced an action against the State Lumber Company, *Lovejoy*, and *Edward Bradley* to redeem his interest in said lands, and for an accounting as to timber cut, and to secure a reconveyance; and in the course of this litigation this court determined that he was entitled to the relief sought. 71 Wis. 476 (April 17, 1888). After this suit was decided, the Bradleys, Kellys, and *Lovejoy* entered into negotiations with Swift for a settlement. The result of such negotiations was reported to a meeting

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of the board of directors of the State Lumber Company, held June 20, 1889. At that meeting all of the directors were present except *Edward Bradley*, *J. H. Jenkins* representing the Jenkins interest. After a consideration of the matter, a resolution was adopted authorizing a purchase of the Swift interest by the company for $172,000, all the directors present voting therefor. The settlement was finally made, and Swift's interest was conveyed to the company. In February, 1892, the company paid Swift the further sum of $25,257.32 for timber cut on the Jenkins lands prior to that date, and also paid $6,956.13 as expenses of the litigation.

Some time in November, 1891, the plaintiffs and Sweet served a notice upon the officers of that company, calling attention to the fact that the funds of the company had been used in the purchase of the Swift claim and for expenses of the litigation, and claiming that the money so used was a charge against the parties who received the stock issued by the company in consideration for the alleged transfer of the lands upon which Swift had a claim. They also claimed that there was a failure of consideration for which this stock was issued, and that the holders of it ought to make good to the company the amount so expended. They demanded, among other things, that the officers of the company should institute proceedings to cancel such stock and recover all dividends paid thereon, or, if they were entitled to hold the stock, then to compel the holders to make good to the company the amounts so paid out in satisfaction of the Swift claim. The company neglected to take any action in the premises, whereupon this suit was instituted, the plaintiffs suing, in their capacity as stockholders, to enforce the rights of the company for the protection of their rights.

The complaint set out the facts substantially as before stated, and alleged, in substance, that at the time the corporation was formed it was expressly agreed between James Jenkins and the Bradleys, Kellys, and *Lovejoy* that, in con-



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sideration of the issue to the latter of full-paid stock for the Swift interest, they would pay and discharge all claims Swift might have, and save the corporation and the said Jenkins and the stock issued to him harmless therefrom, and would indemnify the corporation and said Jenkins and the subsequent owners of the stock issued to him against any failure of title as to said Swift interest; that pursuant to this agreement the corporation was organized and each of said parties conveyed to it their interests in said lands by quitclaim deeds, Jenkins assuming to convey a one-fourth interest, and the other parties a three-fourths interest therein; that Jenkins parted with his interest upon the express understanding that the other parties should guarantee the title to the Swift interest, and save him and the corporation harmless from any loss or outlay on account of the same; that the stock so issued for the Swift interest, being about 589 shares, was distributed among the Bradleys, Kellys, and *Lovejoy* in blocks proportionate to their several holdings in the land; that Jenkins died, leaving a will, in which he bequeathed one fifth of his stock to his son *James*, and the remainder in trust to his executors for the benefit of his daughters. The complaint then sets out the Swift suit, and the proceedings therein, the settlement and purchase by the corporation of the Swift interest, which is alleged to have been a misappropriation of the funds of the corporation and a wrong to the stockholders; that no part has been repaid to the corporation, nor have they indemnified the plaintiffs, except that W. H. and James Bradley have repaid to the plaintiffs and Benjamin Sweet their several proportions of the money so taken, and except that the Kellys have also settled with Sweet, which settlements were made without prejudice to this litigation. The demand for relief was that the defendants account for all dividends received on the stock, that an account be taken of the moneys paid out by the corporation on account of the Swift interest, and the amounts due from

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the defendants to plaintiffs be ascertained, and that they be adjudged to pay said amount, etc.

The answer alleges, among other things, that at the time of the organization of the corporation, the exact status of the Swift interest was known to all the incorporators and subscribers to stock; that they all supposed that Swift's interest, he being greatly in default, was of little or no value, and it was agreed to disregard any claim Swift might have. It was expressly denied that there was any agreement to indemnify Jenkins against the same, or that they would pay or discharge the Swift claim. It was alleged that *J. H. Jenkins* was present at the meeting of the board of directors when it was decided to buy in the Swift interest, and voted to make such purchase. The answer also sets up the statute of limitations.

The action was entitled as an action against the State Lumber Company, the three Bradleys, the Kellys, *Lovejoy*, *J. H. Jenkins*, and Benjamin Sweet. Service was never had upon the defendant Asa P. Kelly, he having died after the summons was issued, and before service. After the summons was issued, and before the complaint was served, W. H. and James Bradley settled with the plaintiffs, as hereinbefore stated, and they seem to have dropped out of the litigation. During the pendency of the suit the defendants settled with Benjamin Sweet, and he also seems to have passed out of the case.

The action was tried before the court, and, after long delay, findings were filed of the following tenor, in addition to the facts above stated: That the total number of shares in the defendant company subscribed for and issued was 4,571, of which Jenkins had 860. That prior to the date of the incorporation of the State Lumber Company the Bradleys, Kellys, and *Lovejoy* agreed with Jenkins "to take care of and protect the title to the Swift one-fourth interest" so conveyed by them to the company, "and in all

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respects to indemnify and hold said James Jenkins harmless from any defect in the title to said Swift one-fourth interest." That Sweet had no interest in the title to the so-called "Jenkins lands." That the negotiations for the purchase of the Swift interest were conducted by one A. J. Hayward at the instigation of the Bradleys, Kellys, and *Lovejoy*, and that a deed came through him to the company. That the amount paid by the company for the purchase of the Swift interest was $172,000; for timber cut, $25,257.32; and for costs and expenses of litigation, $6,956.13; and that the total amount paid out on account thereof for all purposes was $215,613.63. That the representatives of the Jenkins estate knew nothing of the negotiations as to the settlement with Swift until the resolution to settle the matter was presented at the meeting of the board of directors, and that *J. Howard Jenkins*, one of the executors, who was present, voted for said proposition upon the assurance of W. H. Bradley that the Jenkins estate would not be required to indorse any of the notes of the company given on said settlement, and that the same would be taken care of by the Bradleys, Kellys, and *Lovejoy*, and that the Jenkins estate would not be in any manner prejudiced thereby. That the Swift litigation was carried on by the Bradleys, Kellys, and *Lovejoy*, and neither the Jenkins estate nor Swift was ever called upon to contribute to the expenses of said litigation. That prior to 1892 it was never claimed by *Edward Bradley*, *Lovejoy*, or the Kellys that the Jenkins estate was in any manner to be prejudiced by the Swift claim, and frequent assurances were given at the meetings of the board of directors and the stockholders that whatever obligation arose therefrom should be upon the Bradleys, Kellys, and *Lovejoy*, and that these assurances were given by W. H. Bradley, the president and general manager of the company, in presence of the other members and stockholders. In the eighteenth finding it is stated, in substance, that at

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the time of the commencement of the Swift suit the executors were informed by W. H. Bradley and other members of the company that the Jenkins estate should be in no manner prejudiced by said litigation, and that in the pleadings in that action it was expressly admitted that the Bradleys, Kellys, and *Lovejoy* had in their hands $40,004.29 as due and owing from them as the unpaid balance under the Swift contract.

It was further found that these parties claimed in said litigation that they had attempted to convey said land to the company under a power of sale in the agreement with Swift, and that, if a good title was not conveyed thereby, Swift was entitled, as against them, to the amount received by them by reason of the attempted conveyance to the company; that at the annual meeting of stockholders in September, 1889, there had been paid out of the funds of the company on the Swift claim $15,000; that the Jenkins holding of stock was about one fifth; that W. H. Bradley then expressed the opinion that a proportionate amount should be paid to the Jenkins estate; that the other members present expressed no opinion in relation thereto, but on January 14, 1890, the sum of $3,000 was paid to the Jenkins estate; that said matters of difference came up at the annual meeting in September, 1890, and the principal question in dispute was whether or not the Bradleys, Kellys, and *Lovejoy* should pay back to the company on the basis of the value of the lands as originally turned over to the company; that at that time an additional sum of $50,000 had been paid on the Swift notes, and it was thereupon arranged that the Jenkins estate should receive its proportionate share, and accordingly $5,000 was paid in September, 1890, and $5,000 in March, 1891; that neither *Edward Bradley*, *David Kelly*, nor *Lovejoy* has ever reimbursed the company on account of the failure of title to the Swift interest; that, after the commencement of this action, W. H. and James Bradley paid

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the Jenkins estate $10,300 in settlement of any claim the State Lumber Company or the Jenkins estate might have against them by reason of the failure of title so far as the Jenkins estate is concerned; that the paying of said Swift claim out of the moneys of the corporation, and the refusal of said defendants to reimburse after due demand, was a fraud upon the corporation and upon said Jenkins estate.

As conclusions of law the court found: (1) That plaintiffs were entitled to the relief demanded in the complaint. (2) That at the time of the commencement of this action a cause of action had accrued to the plaintiffs as against *David Kelly*, *Lovejoy*, and *Edward Bradley*, and, the company having failed to prosecute, the plaintiffs were entitled to bring this suit. (3) That the right of action, so far as the Jenkins estate was concerned, was not barred by the statute of limitations. (4) That the defendant company did not have, and never had, a cause of action against the Bradleys, Kellys, and *Lovejoy* until they assumed a hostile position towards the minority stockholders, about 1892. (5) That it was a fraud as to the Jenkins estate to pay the Swift claim without indemnity to said estate. (6) That the Bradleys, Kellys, and *Lovejoy* never paid for their stock in said company; that the company never agreed to take their interest in the Swift interest "purely as a mortgage interest;" that by reason thereof their title to the stock issued to them for the Swift interest failed; that when they and the company elected and decided for themselves that the same had so failed they had a right to return the stock to the company and account for all benefits received; that they voluntarily elected to hold said stock and pay the Swift claim out of the property of the corporation; and that, having so elected, they are, as against the Jenkins estate, chargeable with their proportionate share.

Exceptions were duly filed to nearly all of the findings. A judgment was subsequently entered requiring the defend-

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ants *Edward Bradley*, *David Kelly*, and *Allen P. Lovejoy* to pay to the defendant State Lumber Company the sum of $170,012.88, as follows: *Edward Bradley*, $42,507.72; *David Kelly*, $63,752.58; *A. P. Lovejoy*, $63,752.58. The judgment was to be docketed against the defendants as stated, and execution was to be issued to collect the same. The said defendants were also adjudged to pay plaintiffs' costs. From this judgment the defendants have appealed.

For the appellants there was a brief by *Quarles, Spence & Quarles*, and oral argument by *Charles Quarles*.

For the respondents there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas* and *Finch & Barber*, attorneys, and *James G. Flanders*, of counsel, and a separate brief by *Barbers & Beglinger*, and oral argument by *Mr. Flanders* and *Mr. Charles Barber*.

BARDEEN, J. The determination of this case has been greatly delayed. If any explanation is necessary it may be found in the fact of the inability of the members of the court earlier to meet on any common ground. From the outset, however, the court has been unanimous in the opinion that the judgment of the court below could not stand. The action is one by certain stockholders, suing on behalf of themselves and others similarly situated, to enforce a cause of action supposed to exist in favor of the defendant State Lumber Company and against the defendants Bradleys, Kellys, and *Lovejoy*, which the corporation neglects or refuses to prosecute. As stated in *Land, L. & L. Co. v. McIntyre*, 100 Wis. 245: "The purpose of the remedy in such cases is not to interfere with the exercise of legal discretion on the part of those charged with the primary duty of enforcing corporate rights, but to furnish relief where there is an unjustifiable neglect or refusal to exercise such discretion. Neither is the remedy confined to the one which the corporation may invoke, whether legal or equitable. The

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remedy afforded to the members of the corporation is necessarily in equity, for he has no direct interest to be protected by a personal action. He must proceed in equity or not at all, joining the corporation as a party in the capacity of trustee for all its members. . . . The direct injury to be remedied is to the corporation as a whole. The cause of action belongs to the corporation, but is enforceable, rather than that justice shall utterly fail, by the remedy in equity at the suit of its members." It is therefore the cause of action of the corporation, and not of its members, that may be enforced in this kind of an action. Any supposed agreement or understanding between James Jenkins and the other owners of the land, made prior to the organization of the corporation, and as an inducement between the parties to convey property thereto, is a personal agreement, and cannot be enforced by the corporation. While it may directly affect the rights of the stockholder, such an agreement is not one to which the corporation succeeds, and therefore it has no right to enforce it. It is upon such an agreement that the findings and judgment in this action are based.

The only finding upon which any direct liability can be predicated is the eighth, which is as follows: "That at and prior to the date of the incorporation of said State Lumber Company said *Allen P. Lovejoy*, William H. Bradley, James W. Bradley, *Edward Bradley*, *David Kelly*, and Asa P. Kelly agreed with said James Jenkins to take care of and protect the title to said Swift one-fourth interest so conveyed by said *Allen P. Lovejoy*, William H. Bradley, James W. Bradley, *Edward Bradley*, *David Kelly*, and Asa P. Kelly, and in all respects to indemnify and hold said James Jenkins harmless from any defect in the title to said Swift one-fourth interest; and this agreement was the consideration moving to said James Jenkins for his conveyance to said State Lumber Company of his undivided one-fourth interest in the said 'Jenkins lands,' so called." The other

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findings are of facts supposed to be confirmatory of this agreement. There is very grave doubt whether any such agreement is shown by the evidence as against the defendants concerned in this litigation; but, suppose it is admitted that such an agreement was made, in what possible way is the corporation interested in it? It was made prior to the incorporation of the company, made with an individual who represented no interest but his own, and was purely personal in its character. Under no conceivable theory are we able to perceive how such an agreement, if made, inured to the benefit of the corporation.

We have been greatly troubled to understand the exact position of the court below in its conclusions of law. In conclusion No. 5, he finds that the State Lumber Company did not have, and never had, any cause of action against the defendants Bradleys, Kellys, and *Lovejoy* "until after they assumed a hostile position towards the minority stockholders, about 1892." We are not informed, nor are we able to discover either in the evidence or the findings, just what conduct the defendants were guilty of in 1892, as against the minority stockholders, that created a cause of action in favor of the corporation. There was nothing that we can find that occurred that would enable the company to reach out and lay hold of the agreement said to have been made ten years previous to make it into a cause of action in its favor. The matter is further confused by another finding, wherein it is said: "That at the time of the commencement of this action a cause of action has accrued to the plaintiffs as against *David Kelly*, *Allen P. Lovejoy*, and *Edward Bradley;* and that, the State Lumber Company having failed to prosecute such action, the plaintiffs were entitled to bring this suit." Keeping in mind that it is only such rights as the corporation itself could enforce that can be enforced herein, we have this singular condition of things. In the eighth finding, as noted, the court finds that the Jenkins

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estate had a cause of action against the defendants. In the conclusion of law quoted it is said plaintiffs became entitled to prosecute this cause of action because the corporation has failed to prosecute it. In view of the legal principles governing this class of actions, such a conclusion cannot be justified. Any breach of the agreement found in the eighth finding would have given the Jenkins estate a cause of action on contract, and would have raised no right of action in favor of the corporation. When we come to consult the facts, the conclusion of the court was as clear a *non sequitur* as could be imagined.

We will now turn to another branch of the case. In the twenty-fourth finding the court said: "That the paying of said Swift claim out of money of the said corporation, and the refusal on the part of the said *Edward Bradley*, *David Kelly*, and *Allen P. Lovejoy* to reimburse after due demand made, was a fraud upon said corporation and upon said Jenkins estate." The fifth conclusion is that it was a fraud as to the Jenkins estate to pay said Swift claim without indemnifying said estate. There is no pretense, claim, or suggestion of any fraud, in the course of the whole proceedings, except such as arises from the fact that, after it was determined that Swift's interest was that of a mortgagor, the defendants, as directors, voted that the corporation should buy up his claim, which was done. All parties, including the plaintiff *J. Howard Jenkins*, knew the precise situation. There was nothing hidden or concealed. There was no star-chamber action by the board of directors; no attempt to overawe or intimidate the minority. All parties knew that the title to the Swift interest had failed. A proposition was submitted at a given price. As a business proposition, what was best to do? All agreed and all voted to purchase the Swift title. Independent of the personal relations of the stockholders in regard to this matter, it was certainly not fraudulent for the corporation to purchase something it did

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not own. It got value received for every dollar it expended to buy this title. No one claims it was not worth all that was given for it. When it was decided to make the purchase, the resolution for which Mr. Jenkins voted provided that the money should be paid out of the funds of the company, $40,000 cash, and the remainder in several notes of the company, to become due in the future. The court so finds, and yet in a subsequent finding says that Jenkins voted for the adoption of the resolution of purchase upon the assurance of W. H. Bradley and of the other directors that such notes would be taken care of by the defendants proportionately, and that the Jenkins estate should not be prejudiced thereby. Now, because such purchase was carried out according to the very terms of the resolution, and these defendants have refused to reimburse the Jenkins estate, the court finds that it was a fraud both on the estate and the corporation. On that principle, every time a man breaches a contract he is guilty of fraud. The corporation did not suffer by the deal. It had no title and got title. It paid out its money and got value received. It was no worse off after the transaction than before, as all the interested parties admit that the interest purchased was fully worth the amount paid for it. The fraud, if any, consisted in the fact that the defendants did not keep their agreement with Jenkins. We shall be somewhat slow to extend the doctrine of fraud to the extent sought in this proceeding. It is not sanctioned either by reason or precedent. Whatever was done in this line of the purchase of the Swift interest was directly within the terms of the resolution for which Jenkins voted, to which he gave his express consent. That he was induced to do so by personal assurances of the members of the board of directors gave the corporation no right of action. The corporation had a perfect right to buy in this outstanding title, and to use its funds for that purpose, if such purchase was deemed a good business venture. The value of the stock held by the

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Jenkins estate was in no way affected thereby, any more than it would be affected by any other business transaction of the kind. Whatever obligation the defendants sustained to the corporation arose when the title to the Swift interest failed, and not when it was decided to purchase it. The finding, therefore, that the purchase of the title and the failure of defendants to reimburse the Jenkins estate was a fraud which gave a right of action to the corporation, is wholly unwarranted and without foundation.

The criticisms upon the sixth conclusion of law are equally well justified. The first proposition is that defendants never paid for their stock. This is inconsistent with the eighth finding, before mentioned, and others, to the effect that the conveyance by defendants of the Swift quarter interest, together with the promise to Jenkins, was the consideration for the stock issued to them. It is inconsistent with the fourth conclusion of law, which holds that the corporation never had any cause of action until 1892. If the defendants subscribed and agreed to pay for certain shares of stock, and the attempted payment failed, a cause of action arose at once.

The second proposition is that the company never agreed to take the interest which the defendants had in the Swift quarter "purely as a mortgage interest." This interest had an admitted value of about $15,600, but all parties supposed that it was worth the face value of the stock issued for it. It was upon this basis that it was deeded to the corporation with full knowledge on the part of all concerned. While it may be true that the corporation did not agree to take it "purely as a mortgage interest," it is quite certain that the entire consideration for the stock did not fail. The company got only $15,600, when it supposed it was getting $55,000; and, knowing its precise status, it cannot be said that the *title* to the stock so issued failed entirely.

A further proposition in this finding is quite incompre-

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hensible. It is to the effect that when the company and the defendants elected and decided for themselves that the title had so failed, "they had the right to return said stock to the company and account for all benefits that they had received for and on account of said holdings." As remarked by the defendants' counsel, this would be a comfortable doctrine if correct, and would relieve many a promoter from obligation on his stock subscriptions. No authority has been suggested to support this proposition, and we doubt if any could be found in the books.

The last proposition in this finding is that, having elected to hold the stock and pay the claim of Swift out of corporate property, as against the Jenkins estate the defendants were charged with a proportionate share. It is clear that they had no election as to holding the stock; therefore no obligation could arise against them in that regard. If there was an election, then certainly they could only be chargeable with the difference between what they agreed to give for the stock — i. e. its face value — and the amount they actually did give. The only election in the case was whether the company should buy the property or go without it. Suppose the company had adopted the latter alternative, no one could rightfully claim that the defendants would be responsible for the then value of the land. A promise to indemnify Mr. Jenkins for any failure in this title never inured to the benefit of the corporation so as to give it a right to enforce Jenkins's claims against the promisors. Neither upon the facts found nor the conclusions reached by the trial court are we able to support the judgment rendered.

The judgment requires the three defendants now proceeded against to pay into the company's treasury the sum of $170,012.88. This is on the theory that the corporation should be made whole for all expenditures on account of the failure of title to the Swift interest. This money, if paid, would stand for the benefit of stockholders, and was re-

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quired on the theory that it was the corporation's rights that were being enforced. But we find during the progress of the litigation that plaintiffs settled with two of the defendants upon payment to them of an amount supposed to represent the share that would go to the Jenkins estate upon the basis of the recovery against the other defendants. We are not quite able to reconcile this proceeding. It looks like throwing a much greater obligation upon the men who did not settle than equity will permit. If the plaintiffs had a right to settle with W. H. and James Bradley, pending the suit, a cause of action in favor of the corporation, and accept the fruits of said settlement for themselves, all parties being before the court, it would have seemed more like exact justice to have required the defendants to pay such sum as would make the plaintiffs whole instead of the larger sum which would go to the credit of all shares alike.

It being determined that the judgment entered cannot stand, we turn now to the question of what judgment should be entered under the facts proven. It is upon this question that the court has been in travail. It is a question not free from difficulty. It is clear from what has been said that the alleged agreement between Capt. Jenkins and the defendants cannot be enforced in this action. It is also quite as certain that the officers and directors of the company have not been guilty of any fraud or breach of trust which prejudicially affects the corporate interests of the plaintiffs. In order to better understand the situation, it is well to review briefly the history of the transactions involved in this litigation. Capt. Jenkins was the owner of a three-fourths interest and the mortgagee of the other one-fourth of a tract of 17,000 acres of land, holding the legal title to the quarter interest as security for $10,000 due from Elijah Swift. Under proper conveyances a part of the title reached the defendants, as shown in the statement. A corporation was decided upon and organized. This tract,

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with other lands, was conveyed to it, each grantor executing quitclaim deeds. The price was agreed upon, and full-paid stock issued to each grantor. All parties knew of the exact condition of the title to the Swift quarter. He was many years in default in payment of taxes and interest. It was then supposed that his interest was of little or no value, and it was upon that supposition that it was agreed to give quitclaim deeds to the company. According to the testimony of W. H. Bradley, Capt. Jenkins objected somewhat to the quitclaim deed on account of the Swift claim, but it was arranged that the Bradleys, Kellys, and *Lovejoy* were to take care of it. No more definite statement of this alleged agreement appears anywhere in the evidence. Bradley, it appears, understood this to mean that the parties named were to buy in this interest, if asserted, whatever it might cost. This has been denied by the other defendants, who have asserted that, if liable at all, it was only on the basis of the face value of the stock issued therefor; that the value so fixed was about the true value of the land, and that they never in any manner agreed to become responsible for the increased value, or for any profits the company might realize in after years by such increase in value. This was the mooted question at the various meetings of the directors and stockholders, and the result was always the same.

Thus, from the very beginning to the end of their discussions about the Swift claim, there was a dispute as to the *basis* on which defendants should settle it. The Jenkins estate and W. H. Bradley claimed they should buy it in and pay all the expenses. These defendants asserted that, if liable at all, it was upon the basis of making good to the company the difference between the par value of their stock and the amount the company received thereon. It is a fact of absolute certainty that the defendants supposed they were conveying a good title to the Swift interest under the power of sale in his agreement. This appears not only from the

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testimony of Bradley, but is set out in distinct terms in the answer made by them in the Swift suit. In that suit they set out that they had made such conveyance, and had in their hands about $40,000, which Swift was equitably entitled to. It was an admission of a distinct liability for the difference between the price they received for the land and the amount due from Swift. The amount due from Swift was over $15,500. The amount received for the land in stock of the company was over $55,000. It being determined in the Swift litigation that only a mortgage interest was conveyed to the company, the $40,000 still in their hands became equitably due to it upon the stock it had issued.

The defendants were promoters and directors of the corporation, and occupied toward it a fiduciary relation. As against the other stockholders, they were under the highest moral obligations to make good to the company the difference between what they received and what they in fact paid. All parties had acted under a mistake. While it is probably true that the parties understood the legal scope of their transaction when the conveyances to the company were made, yet they were ignorant of or mistaken as to the antecedent legal rights of the stockholders who conveyed the Swift interest. It is in such cases, if the accompanying circumstances warrant, a court of equity may be appealed to for relief. 2 Pomeroy, Eq. Jur. § 849. This rule is referred to as an answer to the argument that the stock became fully paid by a conveyance of the Swift interest. If, as we shall see, the attendant circumstances are such as not to preclude the company from asking the defendants to make good the payment on their stock, the attempt to claim it as full-paid stock must fail. The rule is general that a purchaser of real property takes it at his own risk, and in absence of proper covenants has no remedy in case of failure of title. 6 Am. & Eng. Ency. of Law (2d ed.), 781; *Union P. R. Co. v. Barnes*, 64 Fed. Rep. 80. But when the grantors occupy a fiduciary

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relation to the grantee, and the parties have acted in ignorance of, or under mistake as to, their antecedent legal rights, a court of equity may look into the transaction and grant relief. Here the parties conveyed under a misapprehension of their relative rights. They supposed the power of sale in the Swift contract gave them full right to convey. This, we believe, is such a mistake as brings the case within the authorities, and will prevent the defendants from claiming their stock as full paid. Beach, Mod. Eq. Jur. §§ 37, 38; 2 Pomeroy, Eq. Jur. § 849; *Blakeman v. Blakeman*, 39 Conn. 320. No one pretends to say that, had the true value of the Swift interest been known, it would have been accepted as payment for the stock issued. At no time during the controversy has any one of the defendants made any such claim. What is more significant is the fact that the defendants never denied their liability to respond to the corporation on the basis admitted in the Swift suit. They joined in the indorsement of the notes to Swift. At the annual meeting in September, 1890, the Kellys advocated a settlement on the basis of the price at which the land was deeded to the company. They took advice from their attorney and were advised that this was the measure of their liability. They settled with Sweet on a basis approximating this standard. At the meetings of the board of directors and stockholders from time to time these matters were under discussion, the one side claiming the redemption of the alleged promise to Capt. Jenkins, the other virtually admitting liability on the lesser basis, but denying the greater liability. The Jenkins estate was demanding money and insisting upon a settlement. At one time the company, by the express consent of some and tacit consent of the other directors, advanced $3,000 to the Jenkins estate, and at later periods two other advances of $5,000 each were made. When we come to read the testimony as to what was said at these meetings, and to consider all the circumstances and surroundings, the conclusion is irresistible



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that these advances were made upon the understanding that the company was to be reimbursed by the defendants on one or the other of the bases stated. It was not until a short time before the commencement of this action that any different understanding was suggested. When *Edward Bradley* succeeded to the presidency of the corporation, he directed the deduction of these advances from dividends declared on the Jenkins stock, and, as we understand the facts, this was done.

Now, considering all these circumstances, there is but one conclusion that a court of equity can arrive at, and that is that the defendants are both legally and equitably bound to make good their stock on the basis of the difference between what they paid and what they received. While it may be true that the cause of action arose to the corporation as soon as the deed was made, yet the conduct of the defendants, and their subsequent recognition of their obligation, in connection with all the surrounding facts and circumstances, are deemed sufficient to show an agreement on their part to pay, and to take the case out of the statute of limitations. So cogent and persuasive are these circumstances that any other conclusion is impossible. As already noted, this action is one on behalf of the corporation, and under technical rules each defendant should be directed to pay into the treasury of the company such proportionate sum as his holding of stock issued for the Swift interest bears to the entire shortage. But it appears that the stockholder Sweet has been settled with, and has no claim in this regard. During the progress of this litigation the Jenkins estate has settled with W. H. and James Bradley, so that they are out of the case. It would be quite unjust to require these defendants to pay in a large sum of money for general distribution to the stockholders. Inasmuch as all interested parties are before the court, and to prevent circumlocution and injustice, the court below may enter a judgment in

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favor of the plaintiffs, the money to go to them directly upon the basis now to be stated. The difference between the face of the stock issued for the Swift interest and the value of the interest conveyed is as follows:

| | |
|---|---|
| Stock issued | $55,631 81 |
| Value of Swift interest | 15,627 60 |
| Difference | $40,004 21 |

Upon this sum interest should be computed from October 4, 1882, to April 1, 1893, at seven per cent., and thence to date of judgment at six per cent. The defendants would be liable for this amount as follows: *A. P. Lovejoy*, three fifteenths; *David Kelly*, three fifteenths; and *Edward Bradley*, two fifteenths. The total stock of the company outstanding is 4,571 shares, of which the plaintiffs had 860. The Jenkins estate would therefore be entitled to $\frac{860}{4571}$ of the sum found due from each of the defendants. Should it appear, however, that the advances to the estate by the company have not been satisfied, the judgment may be varied so as to work out the true equities of the case. On the basis above suggested, the judgment for plaintiffs at this date would be approximately as follows:

| | |
|---|---|
| Against A. P. Lovejoy | $3,212 |
| Against David Kelly | 3,212 |
| Against Edward Bradley | 2,146 |
| Total | $8,570 |

*By the Court.*— The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment for plaintiffs in accordance with this opinion.

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THOMPSON, Receiver, Respondent, vs. BRENNAN, Appellant.

*October 20—November 24, 1899.*

*Promissory notes: Failure of consideration:* Bona fide *purchaser: Court and jury: Motion for direction of verdict: Waiver of jury trial.*

1. In an action by an indorsee of a promissory note, the consideration for which had failed, the evidence (stated in the opinion) is *held* sufficient to make it a question for the jury whether the plaintiff's ownership was *bona fide*, and whether such ownership commenced before the maturity of the note.
2. A motion by each party to an action that a verdict be directed in his favor will not be construed as an admission or agreement that there is no issue of fact, or as a waiver of the right to have the facts passed upon by the jury and a submission thereof to the court.
3. Before directing a verdict the court must look at all the facts in the most favorable light for the other party in which the jury would be at liberty to find them, and then be able to say there is no evidence which would justify a verdict in his favor.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Suit by plaintiff, as receiver of the Citizens' National Bank of Madison, South Dakota, upon a negotiable promissory note for $772, and seven per cent. interest, from the defendant to M. W. Daly, dated December 6, 1887, and due July 1, 1891, which, when offered in evidence, bore, first, the indorsement, "M. W. Daly," in the handwriting of Trow, the cashier of the bank, which had been canceled or scratched out; second, the indorsement, "Without recourse to M. W. Daly," in Daly's own handwriting. It was testified that the note came to the bank January 14, 1888, having been received by Trow, the cashier, while in California, in the course of an adjustment or division of proceeds of certain speculative investments in which Daly, who was a stockholder, Trow, who was cashier, Smith, who was presi-

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dent, of the plaintiff bank, and others, were interested; it apparently having been accepted by Trow, in the course of that adjustment, for the bank. When first entered on the books of the bank, credit therefor was given to Trow's general account. At maturity the note was protested, and thereafter suit was commenced thereon, by direction from the bank, against the defendant, in the name of Daly as plaintiff. In that suit *Brennan* interposed a defense on the ground of fraud and failure of consideration, and a counterclaim seeking to cancel the note and recover back other consideration paid by him, for fraud as to the title of real estate, conveyance of which was the consideration for this note. After the interposition of this answer, when the case was reached for trial in November, 1892, Daly refused to proceed upon his cause of action on the ground that he did not own the note and the suit was not properly in his name; but under the order of the court the trial did proceed upon the counterclaim, resulting, after an appeal to this court, in a judgment dismissing the same. The suit upon the note in the name of Daly as plaintiff appears never to have been disposed of.

In the case at bar the defense interposed was failure of consideration, and that plaintiff was not an innocent holder for value before maturity of the note sued on. A plea in abatement for that another suit was pending under the direction of the present plaintiff was interposed, and after trial thereon a verdict denying the same was directed by the court, the assignment of error upon which, in appellant's original brief, seems to be abandoned. Further facts material to the consideration of the case are stated in the opinion. At the close of the evidence the court directed a verdict for the plaintiff, from the judgment on which this appeal is taken.

For the appellant there was a brief by *Sanborn, Luse &*

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*Ellis*, attorneys, and *E. F. McCausland*, of counsel, and oral argument by *L. K. Luse*.

For the respondent the cause was submitted on the brief of *Geo. C. Cooper*.

DODGE, J. 1. It appearing that the consideration of the note sued on had failed, it was necessary to a recovery that plaintiff should prove that the bank received it in due course of business, before maturity, for value, and without notice of the defenses. Rand. Comm. Paper, § 538.

*Prima facie* proof of such holding might be made by the indorsement written on the note, but the time of that act is in much dispute. The original indorsement of the payee's (Daly's) name was in the handwriting of Trow, the cashier, and before trial had been canceled. The following indorsement in the hand of Daly himself was, "without recourse." Trow's testimony threw much doubt on whether Daly was in California or in South Dakota in January, 1888, when it is claimed the note was first received into the bank; and at and until some time after the maturity of the note the plaintiff's conduct was consistent only with the understanding that Daly was liable to the bank, as he would be under the first indorsement, but would not be under the one without recourse. The note was protested when due,—a ceremony needless if indorsed without recourse. It was thereafter directed to be sued in Daly's name, and expenses thereof were charged to him. Notwithstanding the testimony of Trow that he thought the indorsement was written by Daly in the bank in January, 1888, rendered doubtful by uncertainty of recollection and some contradiction, such conduct on plaintiff's part was sufficient to raise a question for the jury as to whether the indorsement relied on (that in Daly's handwriting) was made before maturity, or at some time thereafter, when the difficulties in the way of recovery in Daly's name

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became apparent. If, however, it were the fact that the note was duly purchased by the bank in January, 1888, as claimed, there was evidence tending to show that such ownership had afterwards terminated, and that only a new and later possession and ownership existed at the time of trial, which did not commence until after maturity. The entries on its books of account *prima facie* support that conclusion and no other. The bills-receivable register shows the note when originally entered to be "Paid." The journal shows first the purchase of the note, and payment therefor to Trow by a credit to his account January 14, 1888; then, on April 1, 1893, that Trow gave his own bill receivable, $988.82, to take up this note, with $180 interest, and $36.82 of other debts which Daly owed the bank; that on April 12, 1893, this bill receivable of Trow was paid by his own bill receivable for $659.21 and Daly's bill or note for $329.61, which last was paid in cash on May 2, 1893; and that on July 24, 1893, the note in suit was again received by the bank, and Trow's bill or note for $659.21 above mentioned satisfied, and he paid the difference, $112.79, by credit to his general account. There is much in the evidence to show that Trow and Daly were involved in mutual transactions with each other, and that many things done by Trow in his own name were in fact done for Daly or for their combined interests. This showing of plaintiff's books of account is met by some attempted explanation by Trow, which is evasive and confused at best, and certainly does not so wholly overcome the *prima facie* significance of these book entries as to exclude any possible inference that the note had been paid to the bank by either Trow or Daly, from whom it was originally received, or by both of them together, and that the plaintiff did not again acquire title till July, 1893, long after maturity. The book entries are very cogent evidence, and can be disputed and explained away only by clear and convincing testimony.

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The attitude of affairs thus indicated by the books is supported by other conduct and circumstances, such as the action brought on the note after maturity in the name of Daly at Trow's direction, the fact that Trow understood from Daly that the latter would take charge of such litigation, and the charging expenses thereof to him. Such facts are further supplemented by the consideration that all acts, either of Daly or the bank evincing a claim of continuous ownership in the latter occurred only after a defense had been interposed which might well embarrass Daly but could not affect an innocent holder.

From the foregoing it is apparent that the *bona fides* and the time of commencement of the bank's ownership of the note should have been submitted to the jury, and that direction of a verdict for plaintiff was error.

2. Respondent calls attention to the fact that each party moved the court to direct a verdict in his favor, and urges that we should adopt and enforce the rule long recognized by the New York courts, that such motions will be construed as an admission or agreement that there is no issue of fact, or as a waiver of the right to have the facts passed on by the jury, and a submission thereof to the court. This rule has been followed in North Dakota, but in no other state, so far as we discover. It has been recognized in the United States courts in cases tried in New York.

The question, though never expressly decided in Wisconsin, was present in *Sabotta v. St. Paul F. & M. Ins. Co.* 54 Wis. 687; *Calder v. Crowley*, 74 Wis. 157; *Plankinton v. Gorman*, 93 Wis. 560; and *Richter v. Leiby's Estate*, 101 Wis. 434,— was urged by counsel in all except the first, and in all the New York rule was impliedly repudiated by reversing the judgments and ordering new trials, while in *Calder v. Crowley* it was said (LYON, J.) the court would be slow to hold that the right to have questions passed on by the jury would be waived by a motion to direct a verdict.

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It is certainly a strained construction to hold that an assertion that there is no evidence against one is an admission that there is none in his favor; yet that is the result of the New York doctrine that a motion to direct a verdict is an admission that there is no question of fact for the jury. Again, in our practice the motion is perhaps most often made to raise some special question of law depending on undisputed facts quite independent of the main issue,— as, for example, the statute of limitations, or the giving of notice of personal injury. It is an extreme doctrine that a party who invokes the opinion of the court on such question of law purposes to waive his right to have the contested facts upon the general merits of his case passed on by a jury. While the constitutional right to a jury trial may be waived by acts, such waiver should not be held to arise from ambiguous acts, from which actual existence of such intention cannot be inferred with reasonable certainty.

These considerations are especially cogent in Wisconsin, where through half a century of practice the motion to direct a verdict has never been held to have any such force as is given to it in New York. With us, certainly, the counsel who makes such a motion cannot rationally be presumed to have intended such result. Through all those years judgments upon verdicts directed by the court have come before this court, many of them where both parties had moved for a directed verdict, with no intimation by this court that such a motion, whether made by one or both parties, surrendered to the court the jury function, or admitted nonexistence of any issue of fact. In all such cases the question has always been declared to be, not whether there was any evidence to support the verdict directed, but whether there was any evidence to support a contrary verdict. *Cutler v. Hurlbut*, 29 Wis. 152, 165; *Lawrence University v. Smith*, 32 Wis. 592; *Spensley v. Lancashire Ins. Co.* 54 Wis. 433; *Sabotta v. St. Paul F. & M. Ins. Co.* 54 Wis. 687, 689; *Lewis*

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*v. Prien*, 98 Wis. 87; *Potter v. Necedah Lumber Co.* 105 Wis. 25.

In the light of such long-continued practice, it would be perversive of the understanding upon which counsel ordinarily make such motions, and of the understanding upon which trial courts consider and decide them, to now apply the New York doctrine *ex post facto*. We adhere to the rule, so often stated, that before directing a verdict "the court must look at all the facts in the most favorable light for the other party in which the jury would be at liberty to find them, and then be able to say there is no evidence which would justify a verdict in his favor." DIXON, C. J., in *Lawrence University v. Smith*, *supra*. Omission of this duty is error, which may be reviewed on appeal.

*By the Court.*— Judgment reversed, and cause remanded for a new trial.

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SELLECK, Respondent, vs. THE CITY OF JANESVILLE, Appellant.

*October 24— November 24, 1899.*

*Municipal corporations: Defective sidewalk: Injury to married woman: Recovery by husband:* Res judicata: *Evidence: Opinions as to future medical attendance: Photographs: Care in employment of physician: Measure of damages.*

1. In an action to recover damages resulting to a husband from personal injuries to his wife, defendant's liability is not rendered *res judicata* by reason of a previous recovery by the wife for her own injuries, the husband not being a party to the former action and there being no privity between him and his wife as to the claim in the later suit.
2. Where, in an action against a city to recover for injuries caused by a defective sidewalk, the city had admitted notice of the actual condition of the walk, evidence of complaints to the street commissioner and an alderman concerning the condition of the walk

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at the place in question, and of the introduction by the alderman of an ordinance requiring the walk to be repaired, etc., is inadmissible on the issue as to the existence of a defect; and its admission in this case is *held* a material error.

3. It was error in such a case to permit a medical expert to testify that plaintiff's wife would require medical attendance in the future, and to estimate the number of visits weekly that would probably be required.

4. Where photographs are not substantially necessary or instructive to show material facts or conditions, and they are of such a character as to arouse sympathy or indignation, or to direct the minds of the jurors to improper or irrelevant considerations, they should be excluded.

5. Where notice of the condition of a sidewalk claimed to have caused a personal injury is admitted, so that no proof thereof is necessary, no evidence as to its condition should be received which is too remote to bear on the question whether it was defective at the very time of the accident.

6. The "services" of the wife, for the loss of which the husband may recover, are not only such services as a hired domestic servant might perform, but also wifely services, such as are due from her, and include the idea of her society; and the measure of recovery is the value to him of such services, not merely their market value. *Keller v. Gilman*, 93 Wis. 9, distinguished.

7. Of a wife bedridden or compelled to move on crutches, suffering severe pain, and with shattered nerves, as the result of injuries, it cannot be said to conclusively appear that her ability is not impaired to render services and assistance, other than physical, to her husband, which would otherwise have been within her power.

8. A husband who used reasonable care in the employment of physicians to treat his wife for personal injuries is not responsible for their failure to exercise the highest skill and adopt the best means to effect a cure.

9. The husband may recover the value of his own services in necessary attendance upon his wife by reason of her injuries, but his recovery in that regard should be limited to the amount for which he could have hired reasonably competent attendance by others.

APPEAL from a judgment of the circuit court for Rock county: JOHN R. BENNETT, Circuit Judge. *Reversed.*

Action to recover damages resulting to plaintiff, as husband, from personal injuries suffered by his wife on October

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18, 1893, from an alleged defective sidewalk upon one of the principal streets of the defendant; the defect alleged consisting in a generally defective and rotten condition of planks and stringers, whereby the planks were loose, so that as plaintiff's wife was walking upon said sidewalk one of said planks was tipped up by another person stepping on the end thereof, her foot caught thereby, and she thrown to the ground, suffering a severe wrench of the ankle and foot, whereby ligaments were torn loose, resulting in a permanently disabled foot, twisted from its natural position, and incapable of use up to the time of the trial, November 28, 1898, and substantially certain to so continue through life. At the commencement of the trial, defendant was permitted to amend its answer so as to admit notice to the officers of the city of the actual condition of the walk. Plaintiff recovered, and defendant appeals, assigning very numerous errors, in the discussion of which such further facts as are material thereto will be mentioned in the opinion. Plaintiff's wife has already recovered her damages for the same injury, the judgment therefor having been affirmed by this court. 100 Wis. 157.

The cause was submitted for the appellant on briefs by *F. C. Burpee*, city attorney, and *Wm. Ruger*, of counsel, and for the respondent on the brief of *Fethers, Jeffris & Mouat.*

DODGE, J. 1. Counsel for plaintiff argues that the liability of defendant is *res judicata*, by virtue of a previous judgment recovered by plaintiff's wife for her own injuries. This contention has some support from decisions in states where the husband is a necessary party plaintiff to recover for the wife's injuries, and the damages therefor belong to him. Under such circumstances the argument in favor of the conclusiveness of the judgment is difficult to escape; but where, as in Wisconsin, he is not a party to such action and

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not interested in the recovery, the reasons for conclusiveness all disappear. A judgment is conclusive only between parties and privies. The husband was, of course, not a party. His wife sued alone. Nor is there any privity between him and his wife as to his now asserted demand. The cause of action is not one which once belonged to her and has been transferred or transmitted to him.

2. Error is assigned for that, against objection, the court admitted in evidence: (a) The testimony of Hanthorn, street commissioner: "Complaints were made to me that the sidewalk was in bad condition; a number of complaints along in the summer,"— and that of Alderman Lutz: "Complaints about the walk were made to me some time about October 10, 1892." (b) Testimony of Alderman Lutz that he introduced a resolution to require a new walk as soon as the complaint was made, and records of common council to show introduction on October 10, 1892, of such resolution, and receipt of a communication October 24, 1892, from Tallman, the owner, stating that he intended to build in the spring, and asking delay till then. The issue as to whether the city had notice of defects, to which this evidence might have been relevant and competent, had been wholly eliminated by admission in the answer. As to the remaining issue, viz., existence of defects, it was wholly secondary and hearsay. The statements or complaints made by others to witnesses Hanthorn and Lutz out of court, and unsanctioned by oath, were incompetent, under the most elementary rules of evidence. The offering of a resolution by Alderman Lutz had no force or relevancy, save as a declaration or admission by him that the walk needed to be rebuilt; and the same is true of the communication from Tallman. It hardly needs to be stated that declarations or admissions by third persons are not competent evidence to establish a fact. The issue whether the walk was defective was sharply disputed, and this secondary and hearsay evidence on the subject assuredly

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influenced the minds of the jury, and must have been prejudicial to the defendant. Its admission was error.

3. A medical expert testified, over objection, to his opinion that: "It is most certain that Mrs. Selleck will require future attendance of a physician by reason of this injury. Judging by the past, she will require attention every two or three days,—a fair average, I would say, would be twice a week for the future. Our usual charge is $1 a visit." This court has recently announced the decision (without the writer's concurrence then, but to which he now yields in deference to the rule of *stare decisis*) that such testimony is improper, as invading either the field of baseless conjecture or that of common knowledge, where the expert cannot guide, though he may mislead, the jury. *Crouse v. C. & N. W. R. Co.*, *ante*, p. 473. Its admission was error, and clearly prejudicial on the question of damages.

4. Error is assigned upon admission in evidence of three photographs, showing the injured foot in variant poses. The distortion was most serious, and its exhibition in aggravated aspects was well calculated to arouse the sympathy of the jury, and to divert their minds from the merely secondary and pecuniary considerations alone relevant to the plaintiff husband's recovery, to thoughts of pain and suffering, both physical and mental, which the injured woman had endured. The photographs were wholly unnecessary to a full description and explanation of her condition so far as it affected the damages recoverable, namely, expenses for nursing and medical attendance, and loss of service and society. Other evidence having shown that expense and the extent of impairment of the wife's condition very fully, the appearance of the foot could hardly be instructive or helpful. In *Baxter v. C. & N. W. R. Co.*, *ante*, p. 307, this court (MARSHALL, J.) said: "There is a limit to the use of photographs as evidence, and it was nearly, if not quite, reached in this case. They are competent for some, but not for all, purposes.

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They may be used to identify persons, places, and things, to exhibit particular locations or objects, where it is important that the jury should have a clear idea of the same, and the photographs will better show the situation than will testimony of witnesses, and where the testimony will be better understood by the use of photographs. . . . There must be some substantial, legitimate reason for the use of such representations, else they should not be received." We are unable to resist the conclusion that the limit so indicated was passed in the present case. There was no substantial, legitimate reason for their use in order to show even the degree of disablement, so far as relevant to the damages the jury had a right to consider. The situation is much as if, in an action under the statute to recover damages for causing death, the plaintiff should show by photographs a terribly mangled condition of the deceased. As a corollary of the rule in the *Baxter Case*, we hold that where photographs are not substantially necessary or instructive to show material facts or conditions, and are of such a character as to arouse sympathy or indignation, or divert the minds of the jury to improper or irrelevant considerations, they should be excluded. *Gilbert v. West End St. R. Co.* 160 Mass. 403, 405; *Harris v. Quincy*, 171 Mass. 472; *Fore v. State*, 75 Miss. 727; *Dobson v. Philadelphia*, 7 Pa. Dist. 321.

5. Some evidence was admitted, over objection, bearing on the condition of the sidewalk at times extending as much as two years prior to the injury. Most of it was, however, connected with the time of the accident by some showing of continuance of the conditions. The court seems to have been induced to admit some of this evidence as relevant to the issue of notice to the city. While it may be unnecessary to decide whether the admission of any of this evidence constituted reversible error, we deem it proper, in view of a new trial, to point out that where notice of the condition is admitted, so that no proof thereof is necessary, no evi-

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dence should be received which is too remote to bear on the question whether the walk was defective at the very time of the accident.

6. Appellant complains because the court instructed the jury that: "In finding the value of her services, you may consider the loss, if any, sustained by her husband in the deprivation of regular attendance, services, and comfort of his wife's society. The comfort of her society can hardly be separated from her services, and the word 'service' implies whatever of aid, assistance, comfort, and society the wife would be expected to render or bestow upon her husband under the circumstances, as shown by the evidence in the case, in the condition in which the husband and wife were placed." The criticism is that the jury were thereby authorized to allow as damages something in excess of the proved money value of the wife's services as a hired servant. The action here brought was well known to the common law, except that our statute (sec. 1339, Stats. 1898) and its predecessors were necessary to render a municipal corporation liable thereto. *Hunt v. Winfield*, 36 Wis. 154. It is brought in the husband's own behalf, and for a wrong done to his own rights. It closely resembles the action of the father for injury to or disablement of his child, or the master for his servant. The measure of recovery differs just as the rights invaded differ,— just as the legal duty owed by the wife differs from that owed by the child or servant. Each of the latter owes the duty of service or labor. The wife owes a broader and a higher duty, of which physical labor may or may not be a part, according to circumstances. Her duty is called in the common-law writs *consortium*, which means conjugal society and assistance. And. Law Dict.; Bouv. Law Dict. So we find that the common law recognized the right of the husband to maintain action against one who tortiously impaired the ability of a servant, child, or wife to perform her duty, and thus deprived the owner of

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his right thereto. Such action, if based on personal injury, was in trespass on the case, *per quod servitium amisit* if for a child or servant, and *per quod consortium amisit* if for the wife. 3 Bl. Comm. 139, 142; *Winsmore v. Greenbank*, Willes, 577. From before the days of Blackstone down to the present time, the authorities, English and American, are, without well-considered exceptions, in accordance with the reason above stated,—to the effect that the husband's recovery is for the loss or impairment of his right to conjugal society and assistance, and ordinarily, where the word "services" is used, it signifies wifely services, such as are due from her, and includes the idea of her society. *Guy v. Livesey*, Cro. Jac. 501; *Hyde v. Scyssor*, Cro. Jac. 538; Cooley, Torts, 266; 2 Hilliard, Torts, 498; Schouler, Dom. Rel. (5th ed.), § 77; Reeve, Dom. Rel. (4th ed.), 88; 3 Suth. Dam. § 1252; *Meese v. Fond du Lac*, 48 Wis. 323; *Shanahan v. Madison*, 57 Wis. 276; *Duffies v. Duffies*, 76 Wis. 374, 8 L. R. A. 420; *Hopkins v. A. & St. L. R. R.* 36 N. H. 9; *Kelley v. N. Y., N. H. & H. R. Co.* 168 Mass. 308, 38 L. R. A. 631; *Laughlin v. Eaton*, 54 Me. 156; *Drew v. Peer*, 93 Pa. St. 234; *Jones v. U. & B. R. R. Co.* 40 Hun, 349; *McKinney v. Western S. Co.* 4 Iowa, 420; *Mowry v. Chaney*, 43 Iowa, 609; *Berger v. Jacobs*, 21 Mich. 215, 221; *Furnish v. M. P. R. Co.* 102 Mo. 669. The wifely services or *consortium* may, and often do, include services such as might be rendered by hired servants; and when that is the case it is usually permitted to prove the customary or market value of such services by testimony of experts familiar with such market value, but it is not necessary that any such physical services should customarily be rendered in order to justify some recovery. *Bigaouette v. Paulet*, 134 Mass. 124; *Kelley v. N. Y., N. H. & H. R. Co., supra; Berger v. Jacobs, supra; Furnish v. M. P. R. Co., supra;* Cooley, Torts, 266; 3 Suth. Dam. § 1252. In the light of these principles, it was not error to instruct the jury that, in placing a value upon the wife's services, they were



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to understand that word as including, not alone such services as a hired domestic servant might perform, but also such as the wife can, and this wife was accustomed to, render, if they found those to be disabled by her injuries, which was substantially the effect of the charge. From the foregoing it is apparent that the husband's damages are the value of his wife's services *to him*, as the court also charged under exception. They cannot be entirely the subject of market value, though part of them may be. Their value is not to be tested by what they could be hired for, or what another would pay for them, for they are not a hireable commodity. This does not at all deny what was said in *Keller v. Gilman*, 93 Wis. 9, 12; for there the subject of inquiry was the market value of certain services, of a kind which might be the subject of hiring, as to which opinion evidence only of value generally, and not to any particular person, has always been held permissible. It should be noted, however, that such of the services or *consortium* owed to the husband as are not mere physical services are less likely to be impaired by an injury merely physical. Because a wife is incapacitated to perform such services as a cook or a housemaid, it by no means follows that she may not extend to her husband the aid of her society and counsel, or her pervading superintendence and care over his household, or nurture and guidance of his children. In the case before us much of conjugal assistance and society was within the injured woman's power, and a caution to this effect might very properly have been given, though its omission, in absence of any request therefor, is, of course, not error. We cannot, however, concur in appellant's view that the evidence disclosed no loss of such elements of the *consortium*. Of a woman bedridden or compelled to move on crutches, suffering severe pain, with shattered nerves, it cannot be said to conclusively appear that her ability is not impaired to render services and assistance, even other than physical, which would otherwise have

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been within her power. *Furnish v. M. P. R. Co.* 102 Mo. 669.

7. There was no error in charging the jury that plaintiff, having used reasonable care in the employment of physicians of good reputation, was not responsible for their failure to exercise the highest skill and adopt the best means to effect a cure. *Selleck v. Janesville*, 100 Wis. 157.

8. The court charged that plaintiff might recover the value of his own services in necessary attendance upon his wife by reason of her injuries, and refused a request for a contrary instruction. The plaintiff owed his wife the duty of care and nursing rendered necessary by her injuries, and was entitled to recover the expenses therein necessarily incurred. If he devoted his own time and services, to the loss of their pecuniary value if otherwise employed, it was obviously a legitimate expense,— as much as if he had hired such attendance from another; and he might recover therefor, subject, of course, to the rule that he must not thus enhance the damages. However valuable his own time and services, he should not be allowed therefor more than the amount for which he could have hired reasonably competent attendance and nursing by others. No such limitation was requested to be given in the charge to the jury, however; hence no error. *Salida v. McKinna*, 16 Colo. 523.

As the cause must be remanded for a new trial, we deem it unnecessary to discuss the further assignments of error as to the details of the trial. They are either not tenable, or the errors complained of are such as are not likely to be repeated.

*By the Court.*— Judgment reversed, and cause remanded for a new trial.

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NICOLAI and another, Respondents, vs. WILKINS, Appellant.

*November 7 — November 24, 1899.*

*Surface waters: Discharge through artificial channel.*

One landowner cannot lawfully collect the waters accumulating in a marsh or basin on his own land, and discharge them through an artificial channel upon or in close proximity to his neighbor's land, to such neighbor's permanent injury.

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Affirmed.*

For the appellant there was a brief by *Pierce, Daubner & Holt*, and oral argument by *W. A. Pierce.*

*Lindley Collins*, for the respondents.

WINSLOW, J. This is an action in equity between the same parties who were involved in the action of *Wilkins v. Nicolai*, reported in 99 Wis. 178, and involves cognate questions. In that case the present defendant (*Wilkins*) was plaintiff, and he sued and obtained a mandatory injunction compelling the present plaintiffs (*Nicolai* and another) to lower a culvert upon their land immediately adjoining the lands of *Wilkins* so as to reopen a drainage ditch which for many years had drained an eight-acre marsh on *Wilkins's* land, on the ground that *Wilkins* had acquired a prescriptive right to have such ditch kept open. In the present action it appears by the findings that *Wilkins* has sunk a tile drain, with lateral branches, in and across said eight acres of marsh, for the purpose of underdraining the same, and that such system of tile drainage ends at a point immediately adjoining *Nicolai's* land, near the culvert involved in the former action, at a depth of eight inches below the bottom of the culvert as it was ordered to be placed in the former action, and that by reason of the lowering of said tile drain there is caused a continual flow of water upon *Nicolai's*

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premises, coming from the artificial drainage of the marsh, which would not flow there in a state of nature, thus causing permanent injury to said premises. Upon these findings the trial court granted a mandatory injunction requiring *Wilkins* to raise his tile drain to a point on a level with the bottom of the culvert as it was ordered to be placed in the former action, and enjoining him from lowering the same in the future; and from this judgment *Wilkins* appeals.

The findings are supported by the evidence, and they clearly present a case where a landowner has attempted to collect the waters accumulating in a marsh or basin on his own lands, and discharge them through an artificial channel upon or in close proximity to his neighbor's land, to such neighbor's permanent injury. It is well settled that he cannot lawfully do this. The principle has been frequently stated, and no discussion would be profitable. *Schuster v. Albrecht*, 98 Wis. 241.

*By the Court.*— Judgment affirmed.

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## Fox and others, Respondents, vs. MARTIN, Appellant.

*November 7 — November 24, 1899.*

*Instructions to jury: Special verdict: Wills: Undue influence: Confidential relation: Secrecy as badge of fraud.*

1. It is the better practice in submitting questions to a jury to confine the instructions to such a statement of the law as to each question as is called for by the evidence and necessary to enable the jury to answer it intelligently. The contrary course is *held* to have led, in this case, to advisory findings by the jury (which the court adopted) upon probabilities suggested in the charge but not arising from the evidence.
2. Probate of a will was contested by testator's children on the ground that its execution was procured by the undue influence of his sister

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and brother-in-law, to whom, with others of his sisters and brothers, it gave equal shares with the children in his estate. A finding that the will was so procured is *held* not to be sustained by the evidence, which, among other things, negatives the existence of confidential relations between the testator and said sister and brother-in-law, wholly fails to show that they prejudiced him against his children or solicited or procured the making of a will favorable to themselves, or that the will was made in secret and other relatives excluded, and shows that, under all the circumstances, the testator's disposition of his property was perfectly natural, and that the will was his free, voluntary, and intelligent act.

8. Secrecy in the making of a will is not a badge of fraud unless the circumstances are such as to suggest need of protection for the testator in order that he may express his own will instead of the will of some other person.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

The appeal is from a judgment of the circuit court reversing a judgment of the county court of Waukesha county, respecting the validity of the will of Warren H. Stickney, and decreeing such will void on the ground of undue influence. Mr. Stickney was possessed of a small amount of personal property, a farm consisting of 190 acres in Waukesha county, and a tract of land in Dunn county, the latter supposed, from the consideration named in the deed, to have been worth about $900. He had three children, all adults,—two sons, *Joseph Hollis Stickney* and *Percy Warren Stickney*, and a widowed daughter, *Ellen A. Fox*, who had two children and was in very poor circumstances. The testator had eight brothers and sisters. Before making his will he made a deed and left it in possession of the person who drew it, conveying the Dunn county land to his son *Hollis*. He also made a bill of sale, conveying to *Everett Martin*, a brother-in-law at whose home he lay sick, his personal property. He willed his homestead to his three children, his brother-in-law *Martin*, and five of his brothers and sisters, including Mrs. Martin, in equal shares. Elva J. Nicolai, a sister living

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a short distance from the home of the Martins, Volney J. Stickney, a brother, and Alice M. Fraser, a sister, all living near, were not remembered by the testator in his will. On the trial the foregoing facts appeared, and the following, upon which the contestants rely to establish their claim that *Everett Martin* and wife unduly influenced the testator to make the will as he did:

None of the testator's children or his brothers and sisters, outside of the *Martin* home, were notified of the making of the will so they could be present. *Martin* and his wife were present and were remembered to a much greater extent than the other relatives. The testator made statements during the later years of his life that he intended that his children should have his property. There was evidence tending to show that Mrs. Martin did not like the daughter *Ellen*, and had advised the testator, while *Ellen* and her children were living with him, to get rid of her if he could not get along otherwise. There was also evidence tending to show that when the daughter called to see her father after the will was drawn, Mrs. Martin told her that he was not in a condition to be seen. *Mr. Martin*, by direction of Stickney, procured the presence of Thomas F. Bayley for the purpose of preparing some papers for Stickney. Stickney was fifty-seven years of age at the time of his death. He was divorced from his wife about 1885, the custody of his three children being awarded to the wife, with whom they resided most of the time thereafter. After the divorce the testator lived for about two years with his father and sister Ida (who afterwards became the wife of *Everett Martin*), on the father's homestead in Waukesha county, Wisconsin. He then, under a deed from his father, took possession of the land devised by his will, and resided thereon alone till 1897. In the meantime his father died. In 1897 he induced his daughter *Ellen* and son *Hollis* to live with him, because of the fact that he was becoming too feeble to work his farm and get

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along alone, though he was at that time able to do considerable work. In March, 1898, he required his children to go away because he could not bear the presence and noise of the daughter's children. He lived alone on his farm thereafter till July 31, 1898. On that day he went to the home of the Martins for a visit. He was accustomed to make such visits and to take his washing to his sister to be done. At this time the testator, though able to do considerable work and all his business, was enfeebled physically by rheumatism caused by an old injury to his knee, and some other complaints. He walked by the use of a cane, and sometimes two canes. Soon after he arrived at the Martins on the date stated, he was taken quite ill. The next day he was worse, and, quite early, he sent *Martin* to procure Bayley to draw some papers for him. Bayley lived some three miles away. On the journey to procure Bayley, *Martin* stopped at Mr. Nicolai's, a brother-in-law of Mr. Stickney, with whom his son *Hollis* resided. *Martin* left word at Nicolai's that Stickney was dangerously ill and wanted Nicolai to come and settle for some potatoes for which he was indebted. There was some dispute in the evidence as to whether *Martin* inquired for *Hollis* or left word specially for him.

Mr. Bayley arrived at *Martin's* place about 9 o'clock of the day mentioned and before seeing Stickney requested *Martin* to find out about the papers that were to be drawn. *Martin* then interviewed Stickney and thereafter gave instructions for a deed to be drawn conveying the Dunn county land to *Hollis*, but said nothing about a will. Bayley, after drawing the deed, conversed with Mr. Stickney about the will, no one being present but the two. After receiving Stickney's instructions he drew the will and read it over to him, no one else being present, and the testator expressed his satisfaction with its provisions. *Martin* and Charles Haese were then called in and the will was executed, the former knowing nothing about its contents. Mr. Stickney

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sat up in bed, getting to that position without help. *Martin* sat behind him so that he could steady his body by leaning back, and then, with a piece of board on his lap and the draft of the will on the board, he wrote his name to the paper. He then lay down and the piece of board was placed on the side of the bed, and, using that as a rest for the will, Charles Haese and Mr. Bayley, at the testator's request, signed as witnesses, each in turn kneeling down at the bedside when writing his signature. In the position they occupied when writing their names the testator could not see them write, which caused him to remark: "I suppose you are signing, but I could not swear what you are doing," whereupon Mr. Bayley told him that it was not necessary that he should be able to swear to that fact; that it was sufficient that the witnesses were able to swear that they signed the will as witnesses in his presence. *Mr. Martin*, after consultation with Mr. Stickney, paid for drawing the papers, and told Bayley to keep the will. Mr. Nicolai, in response to the request to come over and settle for the potatoes, happened in during the time the papers were being drawn, and made such settlement, doing the business with *Mr. Martin*. Nothing was said to him about the will. The son *Hollis* visited his father in the afternoon, but was not told about the execution of the papers referred to. No directions were given by Stickney as to what to do with the bill of sale or the deed. *Martin* took the former and Bayley kept the latter to perfect it for record by affixing thereto a revenue stamp, and to then deliver it to *Hollis*, which he did, after some delay on account of difficulty in procuring the stamp, but not till after Stickney's death, which occurred the eighth day after the papers were made. Stickney was a very eccentric man, who had his own peculiar notions and carried them out, customarily, in his own way. He was of sound disposing mind and memory when he made the will.

The court, added to some advisory findings by the jury,

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found as facts that Mr. Stickney executed the will with full knowledge of its provisions, and was of sound mind and testamentary capacity; but that he was very ill, suffering from pain, and that the will was not his free and voluntary act, but an act performed by him under undue influence exerted upon his mind by *Everett Martin* and his wife to obtain special benefits to themselves to the detriment of the testator's children. Judgment was rendered accordingly.

For the appellant there was a brief by *Tullar & Lockney*, and oral argument by *Henry Lockney*.

For the respondents there was a brief by *Ryan & Merton*, and oral argument by *E. Merton*. On the subject of undue influence they cited *Disch v. Timm*, 101 Wis. 191; *In re Derse's Will*, 103 Wis. 108; *Marx v. McGlynn*, 88 N. Y. 357; *Hartman v. Strickler*, 82 Va. 237; *Porter v. Throop*, 47 Mich. 324; *Rivard v. Rivard*, 109 Mich. 98.

MARSHALL, J. Is the finding of fact that the will was procured by undue influence, and for the benefit of *Everett* and Ida F. Martin, supported by the evidence? An answer to that is conclusive of this appeal.

The challenged finding, as indicated in the statement of facts, was primarily made by a jury. It became the decision upon which the judgment rests by adoption by the trial court. A careful reading of the evidence fails to disclose the foundation for it, keeping in mind that reasonable probabilities arising from such evidence, excluding mere speculation and conjecture, must govern. Looking elsewhere than to the evidence for a solution of the inquiry as to where the jury went for the inference embodied in their verdict, the instructions given by the trial court seem to furnish a key to the situation. They cover some twenty-four printed pages, about half as much as the entire evidence in the case. On the particular question under consideration they are quite exhaustive, referring to almost

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every circumstance said in the books to be evidentiary of undue influence. In that regard the instructions indicate much learning and industry, but as a clear, concise statement of the law applicable to the particular question which the jury were called upon to decide on the evidence they are very misleading. It is the better practice, in submitting questions to a jury, to observe the rule that instructions should be confined to such a statement of the law as to each question as is called for by the evidence and necessary to enable the jury to answer it intelligently. A long, argumentative discussion of principles, full of suggestions as to evidentiary facts, pointing to their probable existence, though there be no evidence to support that view, is quite likely to result in a miscarriage of justice, especially where the situation of the parties is such as to stimulate sympathy for the one and prejudice against the other. In such circumstances juries will easily reach a conclusion that suggested probabilities in favor of the weaker party exist and are of sufficient probative power to warrant a finding of the existence of the ultimate fact in issue, when, if pains were taken to fence their deliberations securely within the limits of the evidence produced, and to submit to them only questions in regard to which there are reasonably conflicting inferences from such evidence, and to give to the jury the law applicable thereto and none other, the result would rarely be other in fact than in theory,— the safest and most just test of where the truth lies. The mischief of a contrary course is rarely better illustrated than in this case. It not only led, as it seems, to a finding of fact upon suggested probabilities not arising from evidence produced, but the trial judge adopted the result as his deliberate conclusion, and rendered judgment thereon.

The suggestions referred to, not warranted by the evidence, in the main are: (1) The existence of confidential relations between the testator and the Martins; (2) creation of

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prejudice by the Martins in the mind of Mr. Stickney against his children; (3) the Martins were guilty of solicitation and procuration in regard to securing a will favorable to them, and were particularly active in that regard; (4) the testator made an unnatural disposition of his property; (5) the will was made in secret, the Martins being instrumental in excluding the testator's children and other relatives from his presence, instead of notifying them that a will was to be made so they might be present and protect their interests.

On the subject of confidential relations, the evidence is without dispute that Mr. Stickney was a man who did not have confidential relations with any one; that he was exceptionally a self-willed man down to and inclusive of the time when the will was made; that he did his own thinking, came to conclusions by his own peculiar processes of reasoning, and, on the occasion in question, he expressed fully the reasons for his conduct, as will be more fully stated hereafter. He was a very peculiar and eccentric man. He had lived alone for many years prior to the time he was taken sick, except a short period of very unsatisfactory association with two of his children, particularly with his daughter *Ellen*. He was at the *Martin* home when the will was made without solicitation or influence on their part. He was unexpectedly taken sick while making an ordinary visit to his sister, where it was more natural to go than elsewhere, as the Martins lived on the old Stickney homestead where he had spent much of his life and where his sister Ida had been his associate more recently than any other living member of the Stickney family. Soon after he was taken sick, realizing that the sickness was liable to be serious, he sent *Mr. Martin* to obtain the presence of Mr. Bayley to draw some papers for him, and of his brother-in-law, Nicolai, to settle a business transaction respecting some potatoes. When Bayley arrived *Mr. Martin* received the sick man's directions as to the deed to be made to *Hollis* and reported the same to

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the former. It does not appear that he gave any directions whatever regarding the bill of sale. For aught that appears that was the result of a conversation between Mr. Stickney and Mr. Bayley. When Nicolai arrived to settle for the potatoes *Mr. Martin* received the money to avoid disturbing Mr. Stickney, as he was in some pain and evidently engrossed with the business in hand of having his papers drawn by Bayley. It will be seen that the Martins were not in any position of confidence with Mr. Stickney, which they could have abused for their own advantage. The situation cannot properly be called one of confidential relations, precluding an occurrence for the benefit of one to the detriment of others without the former being responsible for showing that his conduct was free from fraud.

On the subject of prejudicing Mr. Stickney against his children evidence is entirely wanting. True, Mrs. Martin told her brother that if he could not get along with his daughter *Ellen* she would advise sending her away; further, she did not encourage the presence of the daughter when Mr. Stickney was sick, but the state of mind of the father and daughter explains that and shows that Mrs. Martin was in no way responsible for it. Stickney endeavored to live with his daughter and her children, but they annoyed him so intensely that he felt obliged to secure peace of mind by sending them away. Mr. Nicolai, an unfriendly witness, testified that he knew in advance that Mr. Stickney would not be able to live with his daughter and her children and advised strongly against attempting it. After the daughter was sent away she did not visit her father or pay any attention to him till he was on his deathbed. All the indications are that he did not then care to see her. Mrs. Martin, after communicating with him, told the daughter that he was not in a condition to be seen. He did not inquire for her after that, and she did not visit him, even to inquire, till the night he died, though he needed attention night and day for a

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period of some eight days, and he had ample opportunity to express his wishes as to her to his son *Hollis*. The son went to his father's bedside on the day the will was drawn and was there much of the time afterwards till death occurred. He had ample opportunity to communicate with his father about the will and to know his father's wishes as to *Ellen* without any interference whatever from the Martins. The other son was in Missouri. Mr. Stickney had seen but little of any of the children since they were quite young, and evidently had no warmth of affection for any except *Hollis*. After the will was drawn he said that *Hollis* was a nice boy and he had provided for him so as to give him a good start; that it made little difference what he gave the other children, because they would not be satisfied till it was all wasted. That shows clearly the state of Mr. Stickney's mind, as it was privately made known to the man who drew the will, uninfluenced by anybody. Such condition of mind seems quite natural in view of the eccentric character of the man and his history as shown by the uncontroverted evidence. Much significance is given to the fact that the daughter was obliged to take in washing and do other hard service to support herself and children; but it appears that Mr. Stickney wanted her to go to some other part of the country, and that her remaining in the neighborhood, working as she did, under the circumstances, tended to annoy him. He considered that she thereby wilfully brought discredit upon him among his neighbors, as it seems.

On the subject of unnatural disposition of the property, sufficient has already been said to show that the will in that regard was made exactly in accordance with the bent of the testator's mind. He was a man of strong prejudices and was eccentric to a high degree. He remembered his children as he viewed their deserts, and then gave some of his property to such of his brothers and sisters as he desired to remember in that way, providing more particularly for

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his sister Ida and her husband than for any of the others, which is readily explained by the fact that such sister stood nearest to him in family regard. As before indicated, she lived on the old homestead and to her he felt more free to turn than to the others, as is evidenced by the fact that he had customarily taken his washing to her home to be done and had been accustomed to visit her frequently. On the whole, considering the mental characteristics of the testator and the relations he sustained to his relatives, the disposition of his property was perfectly natural and intelligent.

On the subject of solicitation and procurement to secure the making of a will favorable to the Martins, we fail to find any circumstance to create a suspicion. It does not even appear, definitely, that *Mr. Martin*, when he went on the errand to secure the presence of Mr. Bayley, was aware a will was to be drawn. It affirmatively appears that all the directions as to how the property was to be disposed of in the will were given by Mr. Stickney privately to his scrivener, that the will was approved by him when drawn, such approval being accompanied by statements explanatory of his conduct, that he was very decided as to all he wanted done, and was so thoughtful throughout that when the witnesses came to sign he called Mr. Bayley's attention to the fact that he was not in position to see their signatures as they were writing, and had to be assured that it was sufficient if the witnesses actually signed in his presence. From first to last *Mr. Martin* was not consulted as to how the will should be drawn, did not know its contents till it was read in probate court, and did not make any inquiries of Mr. Bayley as to its contents. His conduct throughout appears to have been free from criticism.

On the subject of the will being made in secret, and the other relatives being excluded instead of being called in so as to protect their interests, there is the same lack of evi-

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dence as in respect to the other circumstances mentioned. Reasonable efforts were made to notify the son *Hollis* and Mr. Nicolai of the illness of Mr. Stickney. The other relatives heard of the illness in due time and visited and conversed with the sick man freely, when, as they testified, he was in the full possession of his faculties and conversed as usual. Inasmuch as the will was made without solicitation or influence on the part of the Martins, and they were ignorant of its contents, and there was no question but that Stickney was perfect master of himself in doing as he liked, there was no occasion for any one to be called in to protect him against the Martins, or for their protection against suspicion of wrongdoing in the event of the will being favorable to them. There is liable to be far too much significance given to the circumstance of a person making his will in private. It would be a strange doctrine to adopt, that a person, in making his will, for safety against its being impeached for fraud, must call in his relatives or neighbors. Of all the things that a person about to make a final disposition of his property would think of, if in the full possession of his faculties, that is not one. Men usually make their wills in private and try to keep their provisions profoundly secret so long as they live. The circumstance that a will is thus made is not of itself suspicious in the absence of proof that the mind of the testator was weak and susceptible to undue influence. The presence of others than the favored beneficiary is not for the purpose of consultation with the testator, but to exclude the idea that may otherwise exist, that one was favored because of his solicitation or procuration or other improper influence. The idea that, as a rule, relatives must be called in when a person is about to make his will, is out of harmony with the testamentary right, and contrary to reason and common sense. The adjudications referring to the making of a will in secret as a badge of fraud have no application to situations where the circumstances

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are not such as to suggest need of protection for the testator in order that he may express his will instead of the will of some other person. To refer to the perfectly natural circumstance of a person making a will in private as a badge of fraud, where there is no reason for publicity to insure protection to the testator from those standing near to him, and security to them against the charge of procuring the will for selfish purposes, is not justified by the law and tends to destroy the testamentary right.

No further discussion of the evidence seems to be necessary. The learned court misled the jury by the nature of the charge, and then adopted their finding and passed judgment as before indicated. The instructions led the jury away from the evidence into the realms of conjecture and speculation, and even worse, as it suggested the probability of the existence of evidentiary circumstances of fraud where the evidence shows conclusively that the will was the free, intelligent act of the testator. It seems to have been forgotten that, where the circumstances, to which the court referred as evidentiary of undue influence, exist, calling for explanation, their effect is entirely destroyed by affirmative proof that the will was the free and intelligent act of the testator.

A brief reference to the cases decided by this court will emphasize what has been said, particularly on the question of the significance of want of publicity in the making of a will and the circumstances under which that tends to raise an inference of undue influence. In *Watkins v. Brant*, 46 Wis. 419, the validity of a deed was questioned. The grantor, a weak-minded, partially deaf married woman, entirely unacquainted with business matters, possessed of eighty acres of land, all the property of the family, was secretly induced to convey part of it to a strong-minded, energetic sister without consideration or knowledge of her husband. The grantee worked upon the grantor's mind by interviews and



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solicitations, continued for a considerable period of time, pledging the latter, during such time, not to talk with her husband about the matter. Finally the grantee, by aid of her mother, induced the grantor to go to an attorney's office and sign a deed for sixty acres of land, believing it was a deed for twenty acres.

In *Davis v. Dean*, 66 Wis. 100, the validity of a deed was in question. The grantor was a woman eighty years of age and was incompetent to do business. She had been unconscious, or partially so, for some days before the paper was made, and was in that condition most of the time afterwards till she died. She conveyed all her property to a man not her son, but whom she and her husband had reared and educated, disinheriting her daughter and several families of grandchildren. The time of the transaction was between 9 o'clock in the evening and midnight. The grantee knew beforehand what was to be done, and planned, therefore, to secure absolute secrecy from the other relatives, by selecting night-time for the transaction, procuring the presence of a justice of the peace and the doctor, and inducing two grandsons, who expected to sit up with their grandmother that night, to go home.

In *Cole v. Getzinger*, 96 Wis. 559, the victim of undue influence was an old man, eighty-eight years of age, too infirm in mind and body to intelligently attend to business matters of importance without assistance. The only persons concerned in obtaining the deed, or who had knowledge of it, were beneficiaries, two of whom, however, a daughter and son-in-law, pretended to be acting in the interest of the grantor.

In *Baker v. Baker*, 102 Wis. 226, the testator was seventy-three years of age, so weak mentally as to be easily influenced by his wife, who practically dictated his will, leaving to her nearly all of his property.

In *In re Derse's Will*, 103 Wis. 108, the testatrix was an

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old lady, seventy-three years of age, who had suffered two strokes of paralysis and was helpless and irresponsible. There was no question but that her mind was greatly impaired when she made the will. She had twelve children. The one son with whom she resided, by numerous acts prior to the making of the will, exhibited a disposition to obtain possession of his mother's property. He finally secured the execution of a will very favorable to himself, in place of one previously made leaving the testatrix's property to her children share and share alike.

It will be observed that in each instance there was a subject unquestionably susceptible to undue influence, and there was clear evidence of a disposition on the part of the favored person to exercise such influence. In such a situation the secrecy of the transaction was said to be a significant circumstance, evidentiary of fraud. Lay aside the two elements mentioned, and the mere circumstance of secrecy ceases to be evidentiary of undue influence, and becomes consistent with the usual way in which such business transactions occur. In *Disch v. Timm*, 101 Wis. 179, quoting from *In re Wheeler's Will*, 5 Misc. 279, it was said: "Where interest, opportunity, and a disposition to influence a testator improperly are shown, a presumption of undue influence arises." It follows that where opportunity does not exist, for want of a subject susceptible to undue influence, mere secrecy does not create suspicion or give sufficient significance to the other circumstances stated, standing alone, to create a presumption of fraud. Further quoting, it is said, in regard to the situation when the presumption of undue influence exists, "the burden is then on the party charged therewith to show that the will was testator's voluntary act." Here, as has been seen, the alleged fraud was not established so as to cast upon the defendant the burden of rebutting it. Nevertheless, the fact was established, affirmatively, that

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the will of Mr. Stickney was his free, voluntary, and intelligent act.

*By the Court.*— The judgment of the circuit court is reversed, and the cause remanded with directions to affirm the judgment of the probate court admitting the will to probate.

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KELLER, Appellant, vs. SCHMIDT, Respondent.

*November 7 — November 24, 1899.*

*Negotiable instruments: Fraud: Negligence of maker: Duress: Special verdict: Setting aside answers: Appeal: New trial.*

1. A German farmer, who could not read or write English, executed a promissory note to lightning-rod agents for a sum which he himself had offered in settlement of their claim against him. He asked for no information as to the contents of the paper, although his son was present and could have informed him and he knew he was dealing with swindlers. *Held*, that he was guilty of negligence which would estop him from claiming relief against the note in the hands of a *bona fide* purchaser for value before maturity, even though the original claim was tinctured with fraud and he did not intend to sign a negotiable note therefor.
2. The defense that a negotiable note was obtained by duress of threats of suit is not available against a *bona fide* purchaser for value before maturity.
3. Where the evidence is insufficient to sustain certain findings of a special verdict, a new trial will be awarded on appeal unless the question of the appellant's right to judgment has been raised in the trial court by motion to set aside such findings and for judgment on the remainder of the verdict.

APPEAL from a judgment of the circuit court for Washington county: JAMES J. DICK, Circuit Judge. *Reversed.*

This action is to recover upon a promissory note for $190, given by the defendant to one J. D. Fleming or order, due in six months from May 3, 1898, payable at the express of-

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fice in Richfield, Wisconsin, with six per cent. interest after due, duly indorsed, and held by the plaintiff before due. The answer sets up that the note was given for lightning rods; that a contract to put up the rods was obtained by fraudulent representations; that after the rods had been put up the defendant was induced to sign the note by threats and duress, without knowledge of what he signed, and upon the representation that the note was payable to Fleming and no other person; that defendant is a German, and cannot read or write English, and understands that language imperfectly, and did not know that the paper signed was a negotiable note.

A special verdict was returned by the jury substantially as follows: "(1) That the note was signed by defendant and delivered to Fleming, the payee; (2) that the note was indorsed by Fleming, and plaintiff is the owner thereof; (3) that the note is due and unpaid; (4) that the plaintiff became the lawful owner of the note before maturity, in due course of business, in good faith, and for a valuable consideration; (5) that the terms of the contract of May 2d were fraudulently misrepresented to defendant, whereby he was misled into signing it; (6) that the defendant did not intend to sign the note in question, but only intended to sign a paper obligation to pay Fleming, and no other person, the sum of $190; (7) that the defendant's signature to the note was obtained by fraud; (8) that said note was obtained by duress; (9) that defendant was ignorant of the true character of the note; (10) that defendant was not guilty of negligence in signing the note; (11) that he was not guilty of negligence in ascertaining the true character of the note; (12) that defendant has not ratified the note; (13) that the amount due on the note is $194.50."

Plaintiff moved the court for judgment notwithstanding the answers to questions 5 to 12, inclusive, which was denied. A motion for a new trial was also denied, and judgment was

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ordered for defendant. From the judgment so entered this appeal is taken.

*Simon Gillen*, for the appellant, to the point that the defendant was guilty of negligence, cited *Citizens' Nat. Bank v. Smith*, 55 N. H. 593; *Roach v. Karr*, 18 Kan. 529, 26 Am. Rep. 788; *Douglass v. Matting*, 29 Iowa, 498, 4 Am. Rep. 238; *Fayette Co. Sav. Bank v. Steffes*, 54 Iowa, 214; *Ruddell v. Fhalor*, 72 Ind. 533, 37 Am. Rep. 177; *Ruddell v. Dillman*, 73 Ind. 518, 38 Am. Rep. 152; *Dinsmore v. Stimbert*, 12 Neb. 433; *Williams v. Stoll*, 79 Ind. 80; *Chapman v. Rose*, 56 N. Y. 137; *Fischer v. Von Behren*, 70 Ind. 19; *Mackey v. Peterson*, 29 Minn. 300; *Baldwin v. Barrows*, 86 Ind. 351; *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427; *Bedell v. Herring*, 77 Cal. 572, 11 Am. St. Rep. 307; *Goetter v. Pickett*, 61 Ala. 387; *Cannon v. Lindsey*, 85 Ala. 111; *Rogers v. Place*, 29 Ind. 577; *Greenfield's Estate*, 14 Pa. St. 489; *DeCamp v. Hamma*, 29 Ohio St. 467; *Phelan v. Moss*, 67 Pa. St. 59, 5 Am. Rep. 402; *Ort v. Fowler*, 31 Kan. 478, 47 Am. Rep. 501; *Kellogg v. Curtis*, 65 Me. 59; *Shirts v. Overjohn*, 60 Mo. 305; 2 Am. & Eng. Ency. of Law (2d ed.), 327, 328, note 3; *Rowland v. Fowler*, 47 Conn. 347; *Yellow Medicine Co. Bank v. Tagley*, 57 Minn. 391; *Ward v. Johnson*, 51 Minn. 480; *Swift v. Tyson*, 16 Pet. 1; Daniel, Neg. Inst. (3d ed.), § 850; *Baldwin v. Bricker*, 86 Ind. 221; *German Bank v. Muth*, 96 Wis. 342; *Dodd v. Dunne*, 71 Wis. 578; *Kellogg v. Steiner*, 29 Wis. 626.

*P. O'Meara*, for the respondent.

BARDEEN, J. This is one of that unfortunate class of cases in which a farmer has allowed himself to be overreached and imposed upon. It involves the consideration of two questions: Does the evidence support the finding that, without negligence on his part, he was induced to sign the note in suit, by fraud? Does the evidence warrant the finding that the note was obtained by duress?

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The defendant is a German farmer, and is unable to read or write English, and understands it but imperfectly when spoken. On May 2, 1898, he signed a contract for lightning rods to be put on his house and barn at the rate of forty-seven and one-half cents per foot. The contract was left with him. It is quite probable he did not fully know of its contents, yet he took no means to ascertain what it contained. On the following day, Fleming and one Davis came and put up the rods. It was ascertained that the rods, points, and braces, at the contract price, amounted to $226.07. This the defendant refused to pay, claiming that the price was only to be $11 or $12. After some parleying, offers were made to reduce the amount to $220, then $210, and finally to $200, but defendant refused each offer. At this stage of the transaction occurred the circumstances relied upon to establish duress. We give the defendant's language:

"And then he said if I wouldn't settle with them I would never see them again, but others would come and I would have to pay $500 or $600 in that case. They went out, and attempted to go away; and then, before they left, Davis said if I wouldn't settle with them others would come and it would cost me probably half my farm, or they would take away my stock; that their company was worth millions of dollars." Defendant persisted in his refusal to settle, and the men started from the house to go away. The defendant's version of what followed is here given: "I called them back, and said I would settle with them. That is what I said. . . . When I saw I had dealing with swindlers, I made the offer of $190 just before Fleming and Davis started to leave. . . . I was satisfied to settle with them for $190 to get rid of them. . . . I settled with them to prevent trouble. The trouble I wanted to prevent was the lawsuit. I was afraid. I didn't know what I was doing. The reason I was afraid was because I was dealing with

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swindlers. The only thing I was afraid of was that I thought they would sue me if I wouldn't settle. That is the only thing I was afraid of. I was afraid of nothing else. . . . It is the fact that the only reason why I called them back was that I was afraid they would sue me, and get judgment against me for the lightning rods, and levy on my farm and stock by execution."

In detailing the circumstances under which the note was signed, the witness stated: "After I had signed the paper, Fleming said I should pay only to him and no one else; that he was to take the money. . . Fleming said I shall pay to no one else but him. They said nothing as to who the paper was payable to. After I signed it, Fleming said, 'Don't pay to any one but him.' They said that the paper was made payable to Fleming; so Fleming told me. When Fleming said that, the paper was on the table. At that time the boy or the girl were signing it as witnesses. That was said the first time when I was to sign the paper. I don't think I have signed it or not. . . . When the paper was on the table, before I had signed it, Fleming came to the table and said, 'You must not pay to any one but to me; I am to get the money for the paper.' I then signed the paper, after that." He further said: "I don't know what was in that paper. Fleming and Davis didn't read the paper to me. No one read it to me. No one told me what was in it." On cross-examination, he testified that he knew what it was for; that it was to satisfy the lightning-rod matter, so that he would not have any more trouble or a lawsuit about it. In his examination before trial, he testified that he knew that the paper signed by him was to secure the payment of $190 in six months; that it was to be paid to Fleming at the express office in Richfield; that it was not to bear interest until due; and that it would bear interest after due at six per cent.

We have no hesitancy in saying that, under the circum-

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stances in proof, the finding that the note in suit was secured by fraud, without negligence on the part of the defendant, cannot be sustained. Even though it be admitted that the original contract was tinctured with fraud as alleged, it was left in the possession of defendant after signing, and he took no means to ascertain its contents. His son could read English, yet he was not called upon to interpret it. Before the defendant executed the note, he had full knowledge that the amount claimed was largely in excess of the amount he understood was to be due under the original contract. With that knowledge he called the men back, and offered to settle for $190, in order to avoid further trouble. He repeatedly testified that it was after he had signed the note that Fleming said the money was to be paid to him only. But, whether it was before or after he signed the note, the evidence shows that he was clearly guilty of negligence in signing it. It is not claimed that he was misinformed as to its contents. He asked for no information on the subject. His son could readily have given him all that he desired. He knew that he was dealing with swindlers, and common prudence demanded that he should ascertain the nature and terms of the instrument he was about to sign. Failing in this regard, he was guilty of such negligence as to estop him from claiming relief against the note in the hands of an innocent third party. The evidence being without dispute, and the inferences to be drawn being in no doubt, it was the clear duty of the court to have set the verdict aside in that respect. The cases of *Walker v. Ebert*, 29 Wis. 194, and *Kellogg v. Steiner*, 29 Wis. 626, are expressly based upon absence of negligence, and upon fraud and misrepresentation equivalent to constructive forgery. Similar circumstances do not exist in this case. The following cases illustrate the different phases of negligence that will prevent a recovery: *Citizens' Nat. Bank v. Smith*, 55 N. H. 593; *Roach v. Karr*, 18 Kan. 529; *Douglass v. Mat-*

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*ting*, 29 Iowa, 498; *Ruddell v. Fhalor*, 72 Ind. 533; *Dinsmore v. Stimbert*, 12 Neb. 433; *Chapman v. Rose*, 56 N. Y. 137; *Mackey v. Peterson*, 29 Minn. 300; *Bedell v. Herring*, 77 Cal. 572.

On the question of duress there is an entire absence of evidence to support the jury's conclusion. The only fact upon which duress can be predicated is the threat that if he did not pay or settle it might cost him half his farm. It seems quite unnecessary to discuss this question, as this court has recently determined, in a case where legal duress was shown, that such a defense was not available against the *bona fide* holder of a note before due, for value. *Mack v. Prang*, *ante*, p. 1. It being affirmatively established that the plaintiff is such holder, the finding of duress is no obstacle to a judgment in his favor.

After verdict, the plaintiff moved the court for judgment notwithstanding the answers to the questions upon the subject of fraud and duress. No motion was made to set aside the answers to these questions and for judgment upon the remainder of the verdict, but upon the denial of the first motion the plaintiff moved the court to set aside the entire verdict and for a new trial. It is urged that, in view of the conclusion we have arrived at, we should reverse the judgment and remand with directions to enter judgment for plaintiff. The proper practice in the court below would have been to have moved the court to set aside the parts of the special verdict to which we have referred, and for judgment on the remainder, as pointed out in *Conroy v. C., St. P., M. & O. R. Co.* 96 Wis. 243, and cases therein cited. No such motion having been made, and the possibility that new evidence may be produced by the defendant, renders it necessary to send the case back for a new trial.

*By the Court.*— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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# WOLLMAN, Respondent, vs. RUEHLE, Appellant.

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*November 7 — November 24, 1899.*

*Ejectment: Second trial:* Res adjudicata: *Boundaries: Ancient fences: Adverse possession: Evidence: Transaction with person since deceased.*

1. On appeal from the judgment rendered on the second trial of an action of ejectment, the decision of the supreme court on appeal from the first judgment is *res adjudicata* only so far as substantially the same case is presented.
2. The weight accorded to ancient fences as evidence of the true line between tracts of land is not so great where such line was not at any time marked by original monuments.
3. Notorious, uninterrupted, and unexplained possession of land up to a division fence for twenty years will thereafter be presumed to have been adverse to all the world, not excepting the neighbor across the fence. So far as *Fuller v. Worth*, 91 Wis. 406, may be construed to the contrary it is disapproved.
4. Sec. 4069, Stats. 1898, prohibiting the testimony of a party "in respect to any transaction or communication by him personally with a deceased person," does not forbid testimony of transactions or communications between the deceased and third persons, though in the witness's presence, if he did not participate therein and they were not affected by his presence.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

This action in ejectment was decided by this court, 100 Wis. 31. Thereafter a second trial was had under the statute, and judgment again rendered for plaintiff, from which defendant appeals. The facts, except as noted in the opinion, are sufficiently stated in the report of the former decision.

For the appellant there was a brief by *Christian Doerfler*, and oral argument by *J. H. Roemer*.

For the respondent there was a brief by *Ryan & Merton*, and oral argument by *T. E. Ryan*.

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DODGE, J. Upon the appeal from the first judgment in this case three propositions of mixed fact and law were decided: (1) That the preponderance of the evidence established the correctness of the line occupied by the fence; the proof connecting the survey then before the court with the original lines run and monuments set not being strong enough to overcome the inference or presumption of fact resulting from the location of a fence at a time when original monuments were probably apparent, and its continuance since. (2) That the clear preponderance of the evidence established the location of a fence by agreement in 1856 as the true line, and its maintenance with occupation up to it on both sides for more than twenty years, and that such acts were sufficient to establish ownership. (3) That, independently both of the true location of the line and of the agreement thereon, the preponderance of the evidence established adverse possession under claim of title by defendant and his ancestor for more than twenty years; that he had acquired title, and plaintiff was barred by the statute of limitations. So far as substantially the same case is presented upon this appeal, the previous decision is *res adjudicata*, whether right or wrong. *Crouse v. C. & N. W. R. Co.*, *ante*, p. 473; *Quackenbush v. W. & M. R. Co.* 71 Wis. 472; *Lathrop v. Knapp*, 37 Wis. 312.

1. As to the first proposition above stated, the evidence was very different on the second trial. Another survey had been made, and much testimony was introduced of the finding, not, indeed, the stakes or monuments themselves, but the bearing or witness trees specified in the field notes of the original United States survey, and that the points taken by the surveyor for section and quarter-section corners corresponded with these references. Further, it was shown that in 1876 the town board caused a survey to be made and filed by one Kerns in compliance with secs. 825, 826, Stats. 1898, and that the survey on which plaintiff relied was correct,

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as tested by Kern's monuments, as to which latter there was rather indefinite testimony from Kern's chain bearer that the government stakes, as well as witness trees, were found at the corners of the section in question, and stone monuments put in their places. The presumptive correctness of Kern's monuments is established by the statute (sec. 828). The fact that the line between the parties, being the one-sixteenth section line, was not at any time marked by original monuments, deprives it of some of the weight accorded ancient fences in *Racine v. J. I. Case P. Co.* 56 Wis. 539, and *Racine v. Emerson*, 85 Wis. 80, on the presumption that such old fences were located upon the original stakes then visible. In the light of this additional and different evidence, the former decision of this court is not *res adjudicata* as to the fact of the correctness of the fence as marking the true line, and we cannot say that there was any clear preponderance of evidence against the finding in favor of correctness of the surveyed line.

2. As to the two other propositions decided on the first appeal, most careful comparison of the record now before us with the former one fails to disclose any substantial or material variation in one from the other; and we are constrained to hold, as the court then did, that defendant's title to the land on his side of the fence is established by the great weight and preponderance of the evidence, both from an agreement confirmed by more than twenty years' occupation in accordance with it, and from a distinctly adverse holding for the statutory period of limitation. This conclusion is based upon the conclusiveness of the former decision in this case, and while it must be reached none the less whether, as we have said, that former decision were right or wrong, we mean not to imply any doubt of its correctness. If, as counsel urges, there is any measure of conflict between the holding of the court in *Fuller v. Worth*, 91 Wis. 406, and in the decision of this case on the first appeal, there

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should be no doubt that the latter correctly expresses the settled doctrine of this court on the subject of adverse holding. *Wilkins v. Nicolai*, 99 Wis. 178, and *Meyer v. Hope*, 101 Wis. 123, together with *Wollman v. Ruehle*, 100 Wis. 31, should suffice to set the question at rest. Possession of land and the exercise over it of the ordinary acts of ownership are cogent evidence of title, unless it appear that they are enjoyed and exercised in recognition of ownership in another. *French v. Pearce*, 8 Conn. 439. So cogent and significant are they that, in protection of true title against destruction by possession not expressly explained, but really held in subordination, our statute (sec. 4210) has been enacted to limit the evidentiary effect of possession by providing that, until it has run uninterrupted for twenty years, a presumption shall exist that it is subordinate to the true title. When that twenty years has run, however, that presumption ceases, and the natural one arises that the possession has from its inception been predicated upon claim of title in the possessor, and not in recognition of another's title and permission. *Crary v. Goodman*, 22 N. Y. 171; *Eldridge v. Kenning*, 35 N. Y. St. Rep. 190. The fact that the land in controversy lies contiguous to a fence dividing the possession of the occupant from that of the party claiming title does not distinguish that situation, in principle, from any other. True, certain evidentiary facts are almost characteristic of division fence disputes, such as the understanding, express or implied from conduct, which the respective owners had when the fence was first located, and their treatment of it thenceforward; but those are evidentiary only, and it is none the less the law that he who maintains notorious, uninterrupted, and unexplained possession for twenty years will thereafter be presumed to have done so adversely to all the world, not excepting his neighbor across the fence.

3. The testimony of defendant to the agreement estab-

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lishing the fence line was received against objection, and is here vigorously assailed as prohibited by sec. 4069, Stats. 1898. That section prohibits only testimony of a party "in respect to any transaction or communication by him personally with a deceased person." It does not forbid testimony of transactions or communications between the deceased and third persons, though in the witness's presence, if he did not participate therein and they were not affected by his presence. This construction of the statute is well settled in New York. *Simmons v. Sisson*, 26 N. Y. 265, 277; *Cary v. White*, 59 N. Y. 336; *Hildebrant v. Crawford*, 65 N. Y. 107; *Badger v. Badger*, 88 N. Y. 549, 559. So far as this court has had occasion to approach the question, similar limitation of the statute has been intimated. *Page v. Danaher*, 43 Wis. 221; *Pritchard v. Pritchard*, 69 Wis. 375; *Goerke v. Goerke*, 80 Wis. 520. Unless the transactions or communications are personal, and had with the deceased by the party, either literally or in practical effect, as by participating in or influencing them, they do not fall under the prohibition of the statute, whose words must measure its purpose and application. The transaction testified to by defendant was wholly between Heavner, Malsacher, and defendant's father. Defendant was a seventeen year old boy,— a mere bystander and listener,— and in no wise participated in or influenced the proceedings, so far as appears. He was competent to testify to what transpired.

*By the Court.*— Judgment reversed, and cause remanded with directions to enter judgment for the defendant.

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104 608
106 178

FALKNER, Respondent, vs. WOODARD and wife, Respondents, and HACKETT, interpleaded, Appellant.

*November 7 — November 24, 1899.*

*Deeds: Covenants: Quiet enjoyment: Failure of title.*

A grantee of land who went into possession under a deed containing only a covenant for quiet possession and has remained in possession ever since cannot defend against a mortgage given by him to secure a part of the purchase price, or obtain a deduction from the amount due thereon, on the ground that the grantor did not have title to a part of the premises.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Eaton & Lewis*, and oral argument by *H. L. Eaton.*

*C. E. Armin*, for the respondents *Woodard.*

CASSODAY, C. J. This action was commenced May 29, 1897, to foreclose a note and mortgage for $1,258.60, given March 21, 1896, by the defendant *Woodard* and wife to the defendant *Thomas A. Hackett* as a part of the purchase price of the premises described. On April 12, 1897, *Hackett* assigned the note and mortgage to the plaintiff as collateral security for the payment of $200 and interest. The complaint is in the usual form. *Woodard* answered to the effect that *Hackett* had no title to a portion of the premises, and that he was induced to make the purchase on the misrepresentation of *Hackett* that he was the owner of all the premises. *Hackett* was interpleaded, and took issue with the allegations of *Woodard's* answer, and upon the trial of the issues so formed the court found as matters of fact, in effect, that January 17, 1896, *Hackett* and *Woodard* entered into a written contract by the terms of which *Hackett* agreed to sell and convey by warranty deed, with full covenants, all

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the premises described, and for which *Woodard* agreed to pay him $3,000, possession of the premises to be given on or before April 1, 1896; that March 21, 1896, *Hackett* found it to be impossible to oust the tenant or tenants then in possession of the premises, and so *Hackett* then and there agreed with *Woodard* to throw off from the purchase price $500, and *Woodard* then and there agreed to accept the premises with the tenants then in possession, and assume the responsibility of securing possession from such tenants, by which agreement the purchase price of the premises was then and there fixed at $2,500, and a deed was duly executed, conveying to *Woodard* the premises; that at the same time — March 21, 1896 — *Woodard* paid to *Hackett* a part of the purchase price, and gave back to *Hackett* the note and mortgage in suit for $1,258.60, the agreed balance of the purchase price remaining unpaid, and which mortgage was recorded April 14, 1896; that *Woodard* thereupon obtained and went into possession of the premises under his deed, and paid to *Hackett* the first semi-annual instalment of the interest on the note secured by the mortgage; that thereafter *Woodard* discovered that *Hackett* had no title to a portion of the premises described; that, prior to the making of the contract, *Hackett* fraudulently represented to *Woodard* that he was the owner of all the premises described in his deed to *Woodard*, and had good right to convey the same, and that the same contained 13.86 acres of land, and that *Hackett* furnished an abstract showing such title; that in truth and in fact *Hackett* did not own and had no title to a part of such lands described; that *Woodard* relied upon such representations by *Hackett*; that the value of the land actually conveyed by *Hackett* to *Woodard* was $1,500; that the damage sustained by *Woodard* by reason of such fraud and misrepresentations was $1,000, with interest thereon from March 21, 1896, at six per cent.; that *Woodard* was entitled to a diminution of the amount nominally due on the note and mortgage to the



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amount last mentioned; that April 12, 1897, the note and mortgage were assigned by *Hackett* to the plaintiff as collateral security for the payment of $200 and interest.

And as conclusions of law the court found, in effect, that the plaintiff was entitled to judgment of foreclosure and sale of the mortgaged premises, and that there was due thereon to him $200 and interest at eight per cent. from April 12, 1897, together with his costs and disbursements out of the judgment; that the whole amount nominally due on the note and mortgage was $1,361.37, from which *Woodard* was entitled to a deduction by reason of such failure of title of $1,110.35; and ordered judgment to be entered accordingly. From the judgment so entered *Hackett* brings this appeal.

It is expressly found that, upon *Woodard's* receiving the deed and giving back the note and mortgage, he obtained and went into the possession of the premises under the deed, and paid the first instalment of interest on the note and mortgage. There is no pretense that *Woodard* was ever ousted from such possession. This court has frequently held, in effect, that the grantee in a deed with full covenants, who took possession of the premises at the time of the conveyance, and remains in undisturbed possession, cannot defend an action to foreclose a mortgage executed by him on such premises to secure notes for a portion of the purchase money on the ground that his grantor had no title to the land. *Taft v. Kessel*, 16 Wis. 273; *Ludlow v. Gilman*, 18 Wis. 552; *Bardeen v. Markstrum*, 64 Wis. 615; *McLennan v. Prentice*, 85 Wis. 427. See, also, *Mecklem v. Blake*, 22 Wis. 495; *McIndoe v. Morman*, 26 Wis. 588; *Oakes v. Buckley's Estate*, 49 Wis. 600; *Smith v. Hughes*, 50 Wis. 620; *Clementson v. Streeter*, 59 Wis. 429. The ground upon which these decisions rest is that, the vendee being in the undisturbed possession, which may ripen into a perfect title, it cannot be assumed with any certainty that he has suffered, or ever will suffer, any actual damage by reason of such want of

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title. But in the case at bar it is unnecessary to go to that extent, or to pass upon that question, since the only covenant contained in the deed from *Hackett* to *Woodard* was that "the bargained premises, in the quiet and peaceable possession of" the latter, "his heirs and assigns, against all and every person or persons he" would "forever warrant and defend, free and clear of all incumbrances except one mortgage of $800 and one mortgage of $100," which *Woodard* thereby assumed and agreed to pay. It is undisputed that *Woodard* has remained in possession ever since the delivery of that deed, and hence there is no breach of the covenant mentioned. It follows from what has been said that the trial court improperly allowed a deduction of $1,000 from the purchase price upon the facts found.

*By the Court.*— The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

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JOCHEM, Administrator, Appellant, vs. DUTCHER, Respondent.

104 611
107 427
104 611
118 680

*November 7 — November 24, 1899.*

*Wills: Failure to provide for widow: Election: Retroactive statute: Vested rights.*

1. Prior to the enactment of ch. 123, Laws of 1895 (providing that the widow shall be entitled to the share of her husband's estate as in cases of intestacy, in cases where no provision is made for her by will), the widow's right to share in her husband's personal estate in case no provision was made for her in his will was limited to the allowances for maintenance, etc., provided in subd. 1, 2, sec. 3935, S. & B. Ann. Stats.
2. Although said ch. 123, Laws of 1895, is retrospective in its language, it cannot affect the distribution of the estate of a person who died before its enactment, since the rights of legatees become vested when the will is probated and relate back to the time of the testator's death.

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Jochem vs. Dutcher.

APPEAL from a judgment of the circuit court for Ozaukee county: JAMES J. DICK, Circuit Judge. *Reversed.*

*James F. Trottman*, for the appellant.

For the respondent there was a brief by *H. B. Schwin* and *Wm. M. Foster*, and oral argument by *Mr. Schwin.*

WINSLOW, J. The facts are all stipulated, and may be briefly summarized as follows: Timothy Dutcher, a resident of Ozaukee county, died testate, February 10, 1894, leaving personal estate. More than thirty years ago he lived in the state of New York, and by his first marriage had two children, one of whom survives, and the other is deceased leaving issue. By a second marriage, he married the respondent, *Emily E. Dutcher*, and by her had one son, who is still living. About twenty-eight years ago he deserted the respondent, and came to Wisconsin with one Winefred Rooney, and lived with her as his wife until his death, and had three children by her, who are still living. He was never divorced from the respondent. Prior to his death he made his will, in which he made no mention of his legal wife, but gave all his property to Winefred and his children by her. This will was admitted to probate prior to October 9, 1894, and on that day the respondent filed in the county court an application for a new trial of the question of the probate of the will, which motion was granted, but the will was again admitted to probate after such trial, but at what date does not appear. Thereafter the respondent was allowed $200 under subd. 1, and $300 under subd. 2, of sec. 3935, S. & B. Ann. Stats., and said sums were paid. When the estate was about ready for final settlement, the respondent moved in the county court that, by the judgment of distribution, she be assigned one fourth of the personal estate of the deceased. The county court adjudged that she was entitled to one seventh of the net residue of the personal estate; whereupon the administrator with the will annexed appealed from this

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judgment to the circuit court, which court adjudged the respondent entitled to one fourth of the personal estate. From this judgment the administrator appeals to this court.

The controlling question presented by the record, and the only one which it is necessary to discuss, is the question whether (prior to the passage of ch. 123, Laws of 1895) a widow was entitled to any part of her deceased husband's personal estate over and above the allowances provided for in subd. 1, 2, sec. 3935, S. & B. Ann. Stats., in a case where the husband had made no provision by his will for his widow. The question was suggested as a question of grave doubt, and requiring further legislation, in *Albright v. Albright*, 70 Wis. 528, and *Church v. McLaren*, 85 Wis. 122, but not decided in either of those cases. Careful consideration of the various statutory provisions on the subject convinces us that it must be answered in the negative. By sec. 2281, S. & B. Ann. Stats., it is provided that every person of full age may dispose of all his personal estate by will. By sec. 2171 of the same statute, it is provided that, when lands are devised to a woman or other provision made for her in the will of her husband, she shall elect whether she will take such lands or provision, or claim the share of his estate provided in sec. 2172. By sec. 2172, it is provided that she shall be deemed to have elected to take under the will, unless she shall *within one year* after the death of her husband file a written election to take under the law in the proper county court, and upon filing such notice of election she shall have the same dower and homestead rights and the same share of his personal property as if the husband had died intestate. No other sections give her any right to interfere with the scheme of the will. The right to devise his personal property is thus made absolute in the husband, subject to the allowances named in subd. 1 and 2 of sec. 3935, above referred to, and which are not in issue here. The right of the widow to set aside the will and take as in case of intestacy is con-

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fined by the direct terms of the statute to a case where the will makes *some provision* for her. Where none is made there is no right of election given and hence no right to share in the estate as if it were intestate, because this latter right is entirely dependent upon the making of an election. The whole matter is purely statutory, and where the statute is clear and explicit there can be no change made in it by the courts, even if it works injustice.

The legislature, by ch. 123, Laws of 1895 (which now appears in the last clause of sec. 2172, Stats. 1898), have corrected the evident injustice of the legal provisions above referred to by providing that the widow shall be entitled to the share of her husband's estate as in cases of intestacy, in cases where no provision is made for her by will. This provision is retrospective in its language, but it is plain that it cannot affect the present case, because the rights of the legatees became vested when the will was probated, and related back to the time of the death of the testator. *Scott v. West*, 63 Wis. 529. Hence they could not be affected by subsequent legislation. In this view of the case the consideration of any other questions is unnecessary.

*By the Court.*— Judgment reversed, and action remanded to the county court of Ozaukee county with directions to render judgment in accordance with this opinion.

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FINLAY, Respondent, vs. PRESCOTT, Appellant.

*November 8 — November 24, 1899.*

*Appeal from justice's court: Dismissal: Order or judgment? Appealable order: Signature by mark: Witnesses.*

1. Where a court is without jurisdiction of an appeal from justice's court its province is limited to a mere order of dismissal and for the payment of costs, yet if the determination be in form a judgment the irregularity is not prejudicial.

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2. An order of a lower court dismissing an appeal from justice's court in effect terminates the action and prevents a judgment from which an appeal may be taken, within the meaning of subd. 1, sec. 3069, Stats. 1898, and is therefore appealable.
3. The fact that the marks made for signatures of the appellant to the affidavit and notice of an appeal from justice's court are not witnessed does not affect the sufficiency of the appeal papers.
4. Except as controlled by statute a mark made for one's signature is good whether he could write or not and whether witnessed or not; and our statute (subd. 19, sec. 4971, Stats. 1898) has made no change in the rule, except that a person can sign by his mark only when he is unable to write.
5. Under sec. 4192, Stats. 1898, a written instrument purporting to have been signed by a person by making his mark is, unless such person shall have died previous to the requirement of the proof, *prima facie* evidence that he was unable to write his name, that he therefore made his mark in lieu of a written signature, and that the mark was made by the person by whom it purports to have been made.

APPEAL from a judgment of the county court of Dodge county: J. A. BARNEY, Judge. *Reversed.*

Defendant appealed to the county court of Dodge county from a judgment duly rendered against him in justice's court. The notice of appeal purported to have been signed by the appellant by his mark, as was also the affidavit required by the statute. There was no subscribing witness to the mark and no proof that it was made by appellant, except the fact that the appeal affidavit was sworn to before a notary public, who certified to that fact and that the affiant subscribed the same in the usual form. When the case on appeal was reached for trial, respondent moved to dismiss it for want of jurisdiction, in that the appellant's marks to his notice of appeal and affidavit were not witnessed. The motion was granted solely upon the ground stated. An order or judgment was rendered accordingly, which shows upon its face that it was grounded on the fact that appellant's marks to the appeal papers were not witnessed.

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The cause was submitted for the appellant on briefs by *North & Lindley*, and for the respondent on the brief of *Lamoreux, Davison & Davison.*

MARSHALL, J. A point is made that the determination of the trial court, dismissing the appeal, is not appealable to this court because not a final order terminating the action and preventing a judgment from which an appeal can be taken, *Reinhart v. Fire Asso.* 93 Wis. 452, and *St. Patrick's Congregation v. Home Ins. Co.* 101 Wis. 155, being relied on. In each of those cases the motion to dismiss was denied, so, obviously, the cause remained in court and could proceed to a final judgment from which an appeal might be taken. Such is not this case. It is like *Mason v. Ashland*, 98 Wis. 540. There the motion to dismiss for want of jurisdiction was granted, and it was held that the order dismissing the action was appealable. In such a situation, strictly speaking, a judgment is improper, the province of the court being limited to a mere order of dismissal and for the payment of costs. *Felt v. Felt*, 19 Wis. 195; *Ketchum v. Freeman*, 24 Wis. 296. Formerly, as indicated in the cited cases, only motion costs were proper, but, as the statute now stands, full costs are recoverable on a dismissal for want of jurisdiction where the appeal is from justice's court. Sec. 2925, Stats. 1898. Though, where the court has no jurisdiction, the proper practice is yet to enter an order of dismissal and for the payment of costs. However, if the determination be in the form of a judgment, the irregularity is not prejudicial. Strictly speaking, a judgment is a determination of the rights of the parties; all other directions by the court are orders. *Lewis v. C. & N. W. R. Co.* 97 Wis. 368; sec. 2882, Stats. 1898. All that was said in *Mason v. Ashland, supra*, as to the recovery of motion costs only on a dismissal for want of jurisdiction, does not apply to an appeal from

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justice's court because of the statute on the subject. Clearly, where the circumstances are such that only an order, or a judgment having the effect of an order, is proper, and such determination effectually prevents any other proceedings, it terminates the action and prevents a judgment from which an appeal can be taken, within the very letter of the appeal statute.

We are unable to see why the mere fact that appellant's marks were not witnessed should in any way affect the sufficiency of the appeal papers. The statute (subd. 19, sec. 4971) expressly provides that if a person is unable to write his signature may be written in his presence by some other person by his direction, or he may sign by his mark. It does not require that the mark shall be witnessed, and the court cannot add that as a requisite. The appeal papers appear to have been regularly signed by appellant in the manner allowed by statute. They were presented to the justice of the peace and acted upon by him as genuine. They comply with every statutory requisite. In the absence of some affirmative showing that they were not executed as they purport to have been, they were just as effective as if signed by appellant's written signature.

A signature to a paper by a mark, made by a person for the purpose of identifying himself as a party thereto, was good at common law without any attestation thereof by a subscribing witness, even in case of a witness to a will. Greenl. Ev. § 272; *Zacharie v. Franklin*, 12 Pet. 151. Except as controlled by statute, a mark made for one's signature is good whether he can write or not, and whether witnessed or not. *Baker v. Dening*, 8 Adol. & E. 94; *Brown v. Butchers' & D. Bank*, 6 Hill (N. Y.), 443; *Willoughby v. Moulton*, 47 N. H. 205. The statute does not enlarge the methods of executing written instruments, but modifies the common-law rule so that a person can sign by his mark only when he is unable to write. It does not add a requirement

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that the mark shall be witnessed. *Willoughby v. Moulton, supra; Shank v. Butsch*, 28 Ind. 19; *State v. Byrd*, 93 N. C. 624. One is liable to be led astray on this question by a statement in Story, Prom. Notes (7th ed.), § 11, to the effect that if one sign by his mark the signature must be witnessed to be valid. How that eminent author came to make such a statement as the law, unsupported by any authority, and contrary to substantially all authority except, perhaps, decisions in states expressly abrogating the common law on the subject, is not easily understood. Even in states where the statute requires the mark to be witnessed it has been held that the only effect of it is that the added feature goes to the sufficiency of the paper as proof, itself, of its genuineness; that if the mark is witnessed the paper will be taken as *prima facie* genuine, without other proof; but if not, proof *aliunde* must be produced to entitle the paper to be introduced as evidence or to be recovered upon as genuine. *Ex parte Miller*, 49 Ark. 18.

Under sec. 4192, Stats. 1898, every written instrument purporting to have been signed or executed by any person is proof that it was so signed or executed until the person by whom it purports to have been so signed or executed shall specifically deny the signature to or execution of the same by his oath or affidavit or by his pleading duly verified. That applies to all instruments except those purporting to have been signed or executed by a person who shall have died previous to the requirement of the proof, and to a writing purporting to have been signed by a party by making his mark, precisely the same as if signed in any other way. A paper so signed *prima facie* establishes its genuineness; that is, if signed by a mark, that the signer was unable to write his name, and that he therefore made his mark for the purpose of adopting that in lieu of a written signature, and that the mark was made by the person by whom it purports to have been made. Unlike the Arkansas

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statute, and some others, our statute, as before indicated, makes no mention of a witness to a person's mark in case of his signing that way. The general practice of having such a signature witnessed misled counsel and the trial court as to the necessity for it, as it did, evidently, Judge Story, when he wrote his valuable work on commercial paper.

*By the Court.*— The judgment of the county court is reversed, and the cause remanded for further proceedings according to law.

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ROBERTS and others, Respondents, vs. RUST and others, Appellants.

104 Wis. 619
59 LRA 886

*November 8 — November 24, 1899.*

*Waters: Meander line of lake: Injunction against flooding lands: Pleading.*

1. By ch. 66, Laws of 1899, owners of land adjoining a lake were authorized to restore its waters to the natural flow and line thereof, up to the meander line as indicated by the original government survey, and for that purpose to fill any ditch or outlet which had been dug or deepened since said survey. In an action to restrain the erection of a dam across the outlet of said lake, the complaint alleged ownership, use, and occupation by the plaintiffs and their grantors, for more than forty years, of lands abutting on the lake and the outlet, which would be overflowed and their value diminished by the construction of the dam, and their water supply along the outlet cut off, and that the construction of the dam was wrongful and done with the design to injure plaintiffs; but there was nothing alleged from which it might be inferred that the defendants were owners of land adjoining the lake, or that the outlet had ever been deepened, or that they were acting under said ch. 66. *Held*, that the complaint stated a cause of action entirely outside of said ch. 66, and that the constitutionality of that act was therefore not before the court.
2. Under the allegations of ownership, use, and occupation, for more than forty years, of lands abutting on the lake, it cannot be assumed that such lands are within the meander line.

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Roberts and others vs. Rust and others.

APPEAL from an order of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Affirmed.*

*E. W. Chafin*, for the appellants.

For the respondents there was a brief by *Tullar & Lockney* and *Ryan & Merton*, and oral argument by *Henry Lockney* and *T. E. Ryan.*

BARDEEN, J. The defendants appeal from an order overruling their demurrer to the complaint. The facts alleged show that Spring Lake is a meandered lake in Waukesha county; that plaintiffs are the owners and in possession of land abutting on said lake and upon the outlet to the same, of great value because of their proximity thereto; that since long prior to 1860 the waters in the lake have been continuously maintained at a uniform level, with a stream of water running therefrom through the outlet mentioned; that the land adjoining the lake was valuable as meadow land and lake-front property, and the outlet was useful and valuable for watering stock; that titles to land had changed, and lands had been bought, sold, improved, cultivated, fenced, and used by the plaintiffs and their grantors for more than forty years, relying upon the conditions stated; that about May 4, 1899, the defendants wrongfully caused a dam to be constructed across the outlet to the lake, whereby the water was set back and overflowed many acres of the lake-front lands of the plaintiffs, the water supply of their lands along the outlet was cut off, and their lands diminished in value; that since said wrongful acts were committed said dam has been removed, and the water restored to its former level, but the plaintiffs believe and fear that, unless restrained from so doing, the defendants will replace said dam, as they have threatened to do, to their lasting and irreparable injury. The demand for relief is that the rights of the plaintiffs be adjudged, and the defendants be perpetually enjoined from placing any dam across the outlet of the lake.

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The ground upon which the demurrer is based is that ch. 66, Laws of 1899, makes it lawful for the owners of land adjoining Spring Lake to restore the waters of such lake to the natural flow up to the meander line, as indicated by the original government survey, and to fill up any ditch or outlet which has been dug or deepened since the original government survey. Under this statute it is urged that, inasmuch as the complaint does not allege that the overflowed lands are above the meander line, it fails to state a cause of action. We cannot sanction this view. It is amply alleged that the plaintiffs are the owners and in possession of this land, and that they and their grantors have possessed and occupied the same for more than forty years. The idea of ownership is entirely inconsistent with the theory that the disputed tract is within the meander line. Strictly speaking, the meander line is not a property line in its absolute sense. It is a line adopted by the government for the purpose of defining the sinuosities of the banks of streams and lakes, to determine the actual amount of land in a given tract, to which the property line of adjacent owners may or may not conform, depending upon the location of the actual water line. See cases cited in *Mendota Club v. Anderson*, 101 Wis. 479. It is true the owner of lands bounded by the meandered lake, as such, takes no fee to the soil under the waters. But it is equally true that he has a right to the accretions formed by slow and imperceptible degrees upon or against his land from natural causes, and to those portions of the land of the lake adjoining his land which may be uncovered in the same manner by recession of the water. *Boorman v. Sunnuchs*, 42 Wis. 233. There is nothing in the complaint from which we can infer that the defendants are the owners of any land adjoining this lake, or that the outlet that was closed up has ever been deepened, or that the defendants were acting under ch. 66. It must be conceded that a wrongful closing up of the outlet, which has "existed

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as a running stream or creek flowing from said lake" for all these years, which causes an overflow of adjacent lands, or which deprives the owners of land on the outlet of the use of water as it passes their premises, is an invasion of property rights which a court of equity will protect. We are urged to determine the constitutionality of ch. 66, above referred to. The question is not here for determination. The allegations of ownership, use, and occupation negative the idea that the lands overflowed are within the boundaries which the defendants might claim a right to overflow. Add to these the admitted allegations that the construction of the dam was wrongful and done with the design to injure the plaintiffs, and we have a case entirely without the lines of the statute. If it is deemed desirable to dispose of this case without the expense of a trial on the merits, the defendants may answer, setting up the facts that bring the situation within the terms of the law, and it may then be tested on demurrer.

*By the Court.*— The order of the circuit court is affirmed.

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THE STATE EX REL. GRAY, Appellant, vs. THE COMMON COUNCIL OF THE CITY OF OCONOMOWOC, Respondent.

*November 8 — November 24, 1899.*

*Appealable order:* Certiorari: *Return: Conclusiveness: Quashing writ: Affirmance: Immaterial error: Presumptions: Municipal corporations: Street sprinkling: Determination as to sufficiency of petition: Costs on appeal.*

1. An order refusing to require amendment of the return to a writ of *certiorari* is not appealable.
2. An appeal from an order will be dismissed unless the appellant has caused the order to be transmitted to the supreme court.
3. The return to a writ of *certiorari* is conclusive upon the relator so far as it is responsive to the writ, and he cannot upon affidavits ob-

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tain an order in effect adjudging it untrue and requiring amendment.

4. After return it is proper to quash a writ of *certiorari* upon facts showing either that the discretionary power of the court to review the proceedings in question ought not to be exercised under the circumstances, or that the proceedings were with full jurisdiction and regularity, so that the writ, if continued to further hearing and judgment, would result only in an affirmance.
5. Although upon a motion to quash a writ of *certiorari* an affirmance of the proceedings under review is irregular, the irregularity is not prejudicial where the writ is quashed because the return shows the proceedings to have been with jurisdiction and regular.
6. Where there is nothing to indicate upon what ground a writ of *certiorari* is quashed, it will be inferred from words of affirmance in the judgment or order that it was quashed because the proceedings were with jurisdiction and regular.
7. Upon *certiorari* to review proceedings of a common council in letting a contract for street sprinkling under a charter provision authorizing them to contract for sprinkling and to assess the cost thereof whenever a petition therefor is presented signed by the designated proportion of the taxpayers within the boundaries set forth in the petition, a return showing that the council, through one of its regular committees, investigated the question whether the petition contained the proper number of signatures, and decided it affirmatively by adopting the committee's report, is conclusive and would justify an affirmance, where the sufficiency of the signatures to the petition was the only question presented.
8. Where several appeals are based on a single notice, costs should be taxed as on a single appeal.

APPEAL from orders of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Affirmed as to one order; appeal dismissed as to the others.*

The relator sought, in the circuit court for Waukesha county, to review the proceedings of the *Common Council of the City of Oconomowoc* to make contract for sprinkling of a portion of Summit avenue at the expense of benefited abutting owners. The charter provides that, "Whenever a petition is presented to the common council of said city, signed by at least a majority of all the taxpayers within the

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boundaries set forth in said petition . . . whose aggregate amount of taxable property shall exceed one half of all such property within the bounds designated, as appears from the last assessment roll of said city, asking that said street within the bounds so set forth be sprinkled with water," etc., the council shall have power to contract for sprinkling, and to assess the cost thereof. The defect in the proceedings alleged is that the signers of said petition were neither a majority in number, nor had they a majority in amount of the taxable property within the limits covered by the petition. A writ was issued, commanding the common council to certify "all the proceedings, including the petitions for sprinkling, the records of the common council relating thereto, a certified copy of all the taxable property, and the names of the taxpayers within the boundaries of Summit street between Main street and George street as shown by the last assessment roll of the city of Oconomowoc, and a transcript of all the entries and records and all things touching and relating to such petition and the sprinkling of said Summit street."

The common council returned a certified copy of the petitions and of its records, and further returned, in substance, that upon the receipt of said petitions they and their subject were referred to the standing committee on street lighting and sprinkling; that said committee examined the assessment roll for 1896, and personally investigated as to who were the taxpayers along either side of said Summit avenue between Main street and George street, and found, and so reported, that a majority in number of said taxpayers had signed said petition, and that against the signers more than one half of the taxable property was assessed; that they kept no minutes of said investigation, the same being a personal examination on their part, and that none are on file with said proceedings or report, which report was favorable, and that thereupon, in accordance with the rules of that body,

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the common council granted said petitions; that one of the subjects referred to said committee was the question of fact as to who were or were not taxpayers within the limits on said street, and it was decided by the committee by personal examination and investigation, which was embodied in their report. The council further returned that it had caused an investigation to be made of the report of said committee, and of the facts investigated by it, and that they returned to the writ a list of the taxpayers at the time of presenting said petition along either side of said street, together with the amounts assessed against each of them as appears in the assessment roll of said city, which is a true statement thereof; and also returned the names of said taxpayers who signed the petition, together with the amounts assessed against them (from which it appeared that the signers were a majority both in number and amount). They also certified in their return that the assessment rolls of said city are not a part of the corporate records of said city, within their control, and that they have no means of certifying either the whole or any part thereof to the court.

The relator upon affidavits moved that the return be amended by adding a large number of people, assessed to a considerable amount, to the list of taxpayers upon said street within the limits covered by the petition, and also by adding to such return the assessment roll for the year 1896. This motion came up upon notice, whereupon the respondent made motion to quash the writ, which was argued at the same time. The court rendered and entered an order or judgment in terms denying the motion for amendment, granting the motion to quash the writ, and continuing with the following words: "And it appearing to the court that the doings and proceedings of the said common council in regard to the sprinkling of the said street named in said petition and writ, as appears by the return thereto, are manifestly good and valid in the law, therefore it is determined



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and adjudged that the said action and proceeding of the common council in regard to the sprinkling of Summit avenue in said city be, and is hereby, affirmed." Afterward the court, apparently in further reduction to writing of the decision reached on August 30th, to wit, on September 21, 1897, made a written order reciting relator's motion for amendment and denying the same, which order was filed December 11th.

The relator appealed by a single notice: first, from the order dated September 21, and filed December 11, 1897; second, from "that part of the order made in this action by the circuit court, and entered of record on the 10th day of December, 1897, which orders that the motion to quash the writ of *certiorari* in this action is granted;" and, third, from the judgment rendered on the 30th of August. The notice recites that copies of the orders appealed from are attached thereto. None such appear so attached except the order of September 21st denying the motion to amend, and the judgment of August 30th incorrectly copied.

*John A. Kelly*, for the appellant.

For the respondent there was a brief by *Ryan & Merton*, and oral argument by *E. Merton*.

DODGE, J. 1. The order denying the relator's motion to require amendment of the return to the writ of *certiorari* is not appealable. It is neither an order in an action which determines the same and prevents a judgment from which an appeal may be taken, nor, if in a special proceeding, is it a final order. The appeal from that order must be dismissed.

2. The record contains no order which can be in any wise identified with that described in the notice of appeal as entered December 10th. It is not discoverable from the record that any such order was made, but, whether made or not, the appeal therefrom cannot be sustained where appel-

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lant has not caused it to be transmitted to this court. The appeal so described in the notice must therefore be dismissed.

3. Upon the appeal from the final order or judgment, which both denies the motion to require an amendment of the return and quashes the writ of *certiorari*, the question arises whether any error was committed in so denying the motion to amend, which question, however, is not one of difficulty. While it may well be within the power of the court to require further return where the commands of the writ are not complied with, or to permit amendment of return at the suggestion of the respondent when it is desired to correct some mistake therein, such a motion as this cannot be entertained. The return purports to be complete in itself, except, perhaps, for the omission of the certified transcript of the assessment roll, as to which, however, it is stated that a certified copy is impossible, as the roll is not in the custody or control of the respondent, and the writ is complied with as far as possible by certifying that the lists attached are correct lists as taken from that roll. The motion is an attempt upon affidavits to traverse the return, and to seek, through the medium of an order, an adjudication that the return is not true in fact, and a requirement that the respondents state the contrary of what they have already certified. This cannot be done. The return imports absolute verity so far as it is responsive to the writ. Harris, Certiorari, §§ 126, 213. The relator who selects *certiorari* as his method of review and remedy subjects himself to having his rights decided upon such statement of facts as the return may make, if so responsive. The scope of the so-called "motion to require amendment" being as stated above, the denial thereof was entirely proper.

The order quashing the writ is fully supported by the return, which shows a petition, found upon investigation by the common council to be made by the necessary number

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and amount of taxpayers, a due consideration of the prayer of said petition, and action thereon in accordance with the power conferred on the council by the charter. It further shows that the relator's pecuniary interest in the matter is most trifling. After return, it is proper to quash the writ upon facts showing either that the discretionary power of the court to review the proceedings ought not be exercised under the circumstances (*State ex rel. Clancy v. McGovern*, 100 Wis. 666; *State ex rel. Schintgen v. Mayor of La Crosse*, 101 Wis. 208) or on the ground that the proceedings are with full jurisdiction and regularity, so that the writ, if continued to further hearing and judgment, would result only in an affirmance. It is said in *State ex rel. Cameron v. Roberts*, 87 Wis. 292, 296, that, when the latter fact appears, it is quite immaterial whether the court quashes the writ or affirms the proceedings.

The relator further complains that the order or judgment of August 30th is improper in that, while it quashes the writ, it also in terms adjudges the validity of the common council proceedings, and affirms them. If the writ be quashed upon preliminary considerations which go to its validity or the propriety of its issue, or solely on the ground that facts are not presented to justify the court in reviewing the proceedings at all, it may well be that the regularity of the proceedings is not judicially passed upon, and a judgment affirming the same would differ in effect from a mere order to quash. But where the writ is quashed for the reason that the return shows the proceedings to be with jurisdiction and regular, it is, in effect, a judicial determination of such regularity; and therefore an affirmance (while irregular) could not prejudice the relator, for it would express no more than is expressed in the order quashing the writ. *State ex rel. Cameron v. Roberts, supra; State ex rel. Ennis v. Janesville*, 90 Wis. 157, 160. It is not distinctly apparent here upon which ground the court proceeded, except as it is inferable from

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the judgment itself, and since in that judgment the court has included words of affirmance we must presume that the writ was quashed because the return showed the proceedings jurisdictional and regular. No prejudice, therefore, results to the relator from these perhaps unnecessary words, provided jurisdiction and regularity in fact appear.

The only question made upon the proceedings is whether the petition presented was sufficient to confer jurisdiction by reason of signature by the requisite proportion of taxpayers. This question was one necessarily for investigation and decision by the council. *La Londe v. Barron Co.* 80 Wis. 380; *In re Kiernan*, 62 N. Y. 457; Welty, Assessments, § 280. They appear to have investigated it in a manner consistent with the organization of such a body, namely, through one of their regular committees (*State ex rel. Starkweather v. Common Council of Superior*, 90 Wis. 612), and to have decided it affirmatively by adoption of the committee's report. This is conclusive on *certiorari*, and justifies the conclusion that judgment of affirmance would have been proper, and that the words of affirmance contained in the order quashing the writ are not prejudicial to appellant.

The several appeals being based on a single notice, costs should be taxed as on a single appeal. *Nash v. Meggett*, 89 Wis. 486, 497.

*By the Court.*— The appeals from the order dated September 21, 1897, and from the order entered December 10, 1897, are severally dismissed. The order or judgment quashing the writ of *certiorari* is affirmed.

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## HOFFMAN, Respondent, vs. MAFFIOLI, Appellant.

*November 8 — November 24, 1899.*

*Evidence: Shortage in weight: Contracts: Mutuality: Definiteness: Parol evidence.*

1. In an action to recover the price of several hundred loads of crushed stone, the fact that there was a shortage in three loads which were reweighed is insufficient to establish a shortage in any other load.
2. A written offer by plaintiff to furnish to defendant crushed stone and curbing at certain prices "as per specifications, delivered on street in the city of W. in such quantities as may be desired," was accepted without qualification. No specific reference was made in the writings to a contract which defendant had recently made for macadamizing a street in W. Defendant had, also, at the time, two other contracts for macadamizing in other cities, and some of the stone received from plaintiff was shipped elsewhere. It was admitted by defendant that he was not bound to receive from plaintiff all the stone required to complete the work in W., but only such quantities as he might desire. *Held*, that the contract did not bind plaintiff to furnish all the stone required for that work, but left the amount to be furnished unfixed and unascertainable, and that parol evidence was inadmissible to enlarge or modify its terms. MARSHALL and BARDEEN, JJ., dissent, being of the opinion that, inasmuch as the literal sense of the language used did not constitute the contract a binding agreement, it became the duty of the court to construe it from the standpoint occupied by the parties when making it, and that, so construed, its plain purpose was that the plaintiff should furnish all the stone that might be needed by defendant from time to time for the work upon said street in W.

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Affirmed.*

For the appellant there was a brief by *Clasen & Walsh*, and oral argument by *F. J. Clasen.*

For the respondent there was a brief by *Ryan & Merton*, and oral argument by *T. E. Ryan.*

CASSODAY, C. J. This action was commenced June 28, 1898, to recover $2,888, with interest from June 16, 1898, on

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account for goods, wares, and merchandise sold and delivered by the plaintiff, doing business under the name of "The Waukesha Stone & Quarry Company," to the defendant, between April 23, 1898, and June 16, 1898, at the agreed price, and which was reasonably worth the sum stated, all of which became due and payable June 16, 1898.

The defendant answered by way of admissions and denials, and also alleged by way of counterclaim, in effect, that the defendant was a principal contractor engaged in macadamizing and paving streets, April 15, 1898, and as such principal contractor he entered into a contract with the city of Waukesha for the concreting and paving of the whole of West Main street in that city; that April 21, 1898, the plaintiff, in the name of the Waukesha Stone & Quarry Company, submitted a written proposal to the defendant in the words and figures following, to wit:

"Waukesha, Wis., April 21, 1898.

"*To Mr. G. Maffioli.*

"DEAR SIR: We propose to furnish crushed stone at 85c. per yard of 2,500 lbs., 30 in. x 4 in. curbing, including corners at 34c. per lineal foot, protection curb 15 in. x 4 in. at 10c. per lineal foot, all as per specifications. Delivered on street in the city of Waukesha in such quantities as may be desired.

"Respectfully submitted,

"THE WAUKESHA STONE AND QUARRY CO.,

"per KIEHL, Mngr."

The answer also alleged that such proposal was duly accepted in writing, written thereunder by the defendant, May 4, 1898, as follows: "Accepted May 4, 1898. G. MAFFIOLI;" that the plaintiff had neglected and failed to perform such agreement on his part, in that he misrepresented the actual measurement and weight of stone delivered to the defendant; that it was ascertained by accurate tests made May 30, 1898, of three or four loads of crushed stone

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so delivered by the plaintiff to the defendant, and at different times, that said loads were less in weight by fifty, three hundred, and five hundred pounds, respectively, than was represented by tickets or scale receipts delivered by the plaintiff to the defendant; that the defendant had reason to believe, and did believe, that every load of crushed stone delivered to the defendant by the plaintiff was far less in weight and measurement than represented and charged by him; that the plaintiff absolutely refused to examine or correct the shortage mentioned, and refused to furnish and deliver any further crushed stone or curbing to the defendant, and continued to so refuse; that by reason of such failure, fault, and neglect on the part of the plaintiff the defendant was actually and necessarily hindered and delayed in executing and completing his paving contract, and suffered and sustained great loss of time and damage with his hired men and otherwise to the amount of $1,500. And the answer contained a further counterclaim to the effect that on account of the plaintiff's failure and neglect to furnish crushed stone and curbing as stated the defendant necessarily incurred other and further expenses in order to complete his paving contract, in that he was compelled to, and actually did, procure and purchase such crushed stone and curbing elsewhere, at greatly enhanced prices, to his damage in the sum of $1,000.

The plaintiff, by way of reply, admitted the written contract, but denied all other allegations in the respective counterclaims.

At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed his damages at $2,957.58. From the judgment entered thereon the defendant brings this appeal.

There is no dispute but that the plaintiff actually delivered the amount of curbing which he claims to have delivered, nor that he furnished three car loads of crushed stone,

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which the defendant shipped to Rockford, Illinois; nor that the stone so delivered at the contract price amounted to $1,836.22. There is, however, a considerable dispute as to the amount of crushed stone delivered by the plaintiff to the defendant on the street in Waukesha. It appears that with each load of crushed stone so delivered the plaintiff furnished to the defendant, or to his superintendent, a ticket or memorandum of the weight of the load by the plaintiff's scales. The defendant gave evidence tending to prove that by actual tests on other scales the aggregate weight of three of the loads so delivered was several hundred pounds less than the weight represented by such tickets or memoranda. The defendant only made such tests as to three loads. On the other hand, there is evidence on the part of the plaintiff tending to prove that his weight of each and every load, as represented by such tickets or memoranda, and charged to the defendant, was substantially correct. The question as to the alleged shortage in the several loads of crushed stone seems to have been fairly submitted to the jury. The contract left each party to ascertain the weight of each load of the stone as he might be advised. In case of a dispute about the weight, the only way to determine the same was by submitting the question of weight to the jury. That was done as to the only loads upon which there was any conflict in the evidence. There was no error in charging the jury to the effect that, even if there was a shortage in the three loads mentioned, yet that fact of itself was insufficient to establish a shortage in any of the other 592 loads.

The principal ground urged for the reversal of the judgment is the ruling of the trial court in excluding all evidence as to damages sustained by the defendant by reason of the plaintiff's refusal to furnish any more stone to the defendant under the contract after June 16, 1898. The defendant claims that under that contract the plaintiff was bound to furnish sufficient stone to enable the defendant to complete

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a contract he had previously made with the city of Waukesha for "concreting and paving" the "whole of West Main street" in that city. The defendant's answer alleges, in effect, that April 21, 1898, the plaintiff submitted to the defendant the written proposal to furnish stone as mentioned, and that such proposal was accepted by the defendant May 4, 1898; that at the date of such acceptance it was further agreed and understood that the plaintiff should furnish and deliver, whenever requested by the defendant and without delay, all the crushed stone and curbing necessary for the purpose of concreting and paving the whole of Main street in accordance with the defendant's contract with the city, and that nothing should become due to the plaintiff thereon until the defendant completed its contract with the city and the work should be accepted by the city, and that such agreement included all stone shipped by the plaintiff to the defendant at Rockford; but there is no allegation that such written contract was ever changed or modified in any way. The trial court expressly held that the defendant was at liberty to prove, if he could, that after his written acceptance of the plaintiff's written proposal there was a modification of such contract, or a subsequent contract. The defendant gave evidence tending to prove that the parties had a long conversation, immediately after such written acceptance, as to the capacity of the plaintiff to furnish such stone, but, as held by the trial court, there is no evidence to justify a finding that the written contract was modified in any respect. It follows that the rights of the parties must be determined by the written contract.

The writing so submitted by the plaintiff was a mere proposal to furnish the stone described, at the prices named, and deliver the same on the street in the city of Waukesha in such quantities as might be desired. The defendant's acceptance was absolute, and in no way qualified the proposal. It was conceded on the argument that the defendant

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was not bound to receive from the plaintiff a sufficient amount of such stone to complete his contract with the city. The question recurs whether the plaintiff was bound, at the option of the defendant, to so furnish and deliver stone sufficient to complete the defendant's contract with the city. Of course, in so far as the stone was actually delivered and accepted by the defendant, the parties became bound; but the question is whether the plaintiff is liable in damages for failure to furnish enough more to enable the defendant to complete his contract with the city.

In making the ruling complained of, the trial court manifestly followed the decision of this court in *Wells v. M. & St. P. R. Co.* 30 Wis. 605. In that case it appears that the defendant company telegraphed to the plaintiff that it wanted ballasting done from Brookfield to Milwaukee, for which it would pay at a certain rate per cubic yard, and the plaintiff telegraphed back, accepting the proposition; that the plaintiff also submitted to the defendant a written proposition to do all the train work required by the company for the grading of the depot, side track, etc., in the city of Milwaukee, at a certain price per cubic yard, which was also accepted by the company, and it was held that the contracts were unambiguous, and were for so much ballasting and grading, respectively, at the places named, as the company should wish to have done, and that the parol evidence offered by the plaintiff that a specific amount of such ballasting or grading was required at either place to complete the work or render the road serviceable, and that the plaintiff was prevented by the company from doing such work, to his damage, was properly rejected.

So it has been held in New York that where the defendant offered by letter to receive from the plaintiff, and transport from New York to Chicago, railroad iron, not to exceed a certain number of tons, during certain specified months, at a specified rate per ton, and the plaintiff answered merely

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assenting to the proposal, but did not agree on his part to deliver any iron for such transportation, there was no valid contract binding on either party. *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240. Such ruling has been expressly sanctioned in late cases in that state. *Barrow S. S. Co. v. M. C. R. Co.* 134 N. Y. 24; *Rafolovitz v. Am. T. Co.* 73 Hun, 87.

So, in Massachusetts, where A. wrote to B., a common carrier over one of two routes from the West, that he was about to buy grain in the West, and wished to hear soon if B. was disposed to contract for its transportation, as he should buy in a different market for B.'s route than for the other; that B., in reply, stated his rates for carrying flour from the end of a canal to several towns, and A. then wrote, asking whether the rates applied to grain as well as flour, and whether B. would abate a discrimination in them against A.'s town, and B. answered that he would carry A.'s flour and grain from the canal to that town at a given rate, to continue in force till close of navigation, unless notice to the contrary, and A. replied the same day, accepting the proposal,— it was held that by the terms so ascertained the relation of the parties was in the nature of an open proposition by B. to which A. might, from time to time, give effect as a contract by delivering the flour and grain and calling for its transportation, but that B.'s right to end the contract by notice was unqualified. *Thayer v. Burchard*, 99 Mass. 508. So it has been held in Louisiana that a contract by which one engages to deliver to the other such quantities of coal as he might require during the year, up to a specified limit, at a specified price, but containing no engagement on the part of the buyer to take or pay for any of the coal, was not enforceable against the promisor. *Campbell v. Lambert*, 36 La. Ann. 35; *S. C.* 51 Am. Rep. 1.

So, in Minnesota, where the defendant promised to supply the plaintiffs, who were engaged in a general foundry

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business, with all the Lake Superior pig iron wanted by them in their business from September 2d until December 31st next ensuing the making of the contract, at specified prices, and the plaintiffs simultaneously promised to purchase of the defendant all of such iron which they might want in their business during the time mentioned at the prices named, it was held that such facts did not establish a valid contract, since it did not establish an absolute mutuality of engagement, giving each party the right to hold the other to a positive agreement. *Bailey v. Austrian*, 19 Minn. 535. See, also, *Stensgaard v. Smith*, 43 Minn. 11; *Dayton, W. V. & X. T. Co. v. Coy*, 13 Ohio St. 84; *Utica & S. R. Co. v. Brinckerhoff*, 21 Wend. 139.

The general rule is that, unless both parties are bound so that an action could be maintained by either against the other for a breach, neither will be bound. Bishop, Cont. (enlarged ed.), § 78; Lawson, Cont. § 97. But such general rule has some well-recognized exceptions, as illustrated by the following cases: *Justice v. Lang*, 42 N. Y. 493; *Minneapolis M. Co. v. Goodnow*, 40 Minn. 497; *Jones v. Binford*, 74 Me. 439; *Cooper v. Lansing W. Co.* 94 Mich. 272; *Minnesota L. Co. v. Whitebreast C. Co.* 160 Ill. 85; *Robson v. Miss. River L. Co.* 43 Fed. Rep. 364. As indicated in these cases, whenever the accepted proposition or contract is for the sale or delivery of a specific article or number of articles, or a specific amount of service or materials, or where, by the terms of the contract, the number of such articles, or the amount of such service or materials, is ascertainable, a promise of the other party may be implied, though not expressed in the contract, and hence the engagements are mutual.

In the case at bar the defendant confessedly was not obliged to take from the plaintiff, under the contract, all the stone required to complete his contract with the city, but only "such quantities as" he might desire. The accepted

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proposition makes no reference to his contract with the city. According to the evidence in his behalf the defendant had, at the same time, two other similar contracts,— one at Morgan Park and another at Champaign, Illinois. The answer alleges, in effect, that the three car loads shipped to Rockford, Illinois, were under the same contract. The contract leaves the amount of stone to be delivered unfixed and unascertainable. There is nothing in the contract which implies that it was measured by or limited to the defendant's contract with the city. Of course, parol evidence was inadmissible to enlarge or modify the terms of that contract.

*By the Court.*— The judgment of the circuit court is affirmed.

MARSHALL, J. If I understand the grounds of the court's decision it is that a mere proposition, not supported by a consideration, or accepted, so as to bind each party to do some definite or ascertainable thing, does not constitute a binding contract. The authorities cited in the opinion of the Chief Justice all point that way, and with the law in that regard we have no contention to make. The trouble is, as it seems, the principles of law relied on do not fit the facts of this case. A brief reference to the cases mentioned in the opinion of the court will bear out that view.

In *Chicago & G. E. R. Co. v. Dane*, 43 N. Y. 240, there was a proposition by the plaintiff to receive and transport for the defendant, from New York to Chicago, such iron as it might offer for that purpose during the succeeding six months, which offer was accepted. It was held that the offer of the plaintiff was a mere option, with no consideration to support it; therefore, till accepted with sufficient definiteness to constitute a binding promise on the part of the defendant to furnish some definite or ascertainable quantity of iron for shipment there was no contract between the parties. The case recognizes that if the proposition upon

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the one side were accepted on the other, so as to have the necessary elements of certainty to constitute a binding promise, all the necessary calls of a binding contract would be satisfied.

*Barrow S. S. Co. v. M. C. R. Co.* 134 N. Y. 15, was ruled by the same principle. The difficulty was that there was an accepted offer to carry passengers, no particular number being agreed upon. On the one side it was claimed that the acceptance was made with reference to a suggestion that the number of passengers would be at least 250; on the other, that the acceptance was of rates merely, and that the conversations as to numbers did not become a binding part of the contract, as no definite number was stated on the one side and accepted on the other as a basis for such contract. The court was nearly equally divided in rendering the decision. The difference of opinion was in regard to the construction of the contract, it being conceded that all the circumstances characterizing it were to be considered in determining what the parties intended by their language.

In *Stensgaard v. Smith*, 43 Minn. 11, there was a mere authorization, without consideration, by one person to another to sell the former's real estate. It was held revocable because there was neither a consideration nor mutuality in the contract to support it.

We might go on through all the cases cited, and numerous others of the same nature, which are ruled by these elementary principles: There must either be a present consideration given by one person for the promise of performance by the other, or there must be mutual promises, the one being made in consideration of the other, and the thing promised by each must be definite or ascertainable with reasonable certainty, else there will be no binding contract.

Now before the principles referred to should be applied to this case so as to lead to the result reached by the court, the facts should clearly appear calling for such application,

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and before it should be determined that such facts exist, resort should be had to the well-known rules of construction in order to determine just what the parties intended.

My brethren cite, as conclusive, *Wells v. M. & St. P. R. Co.* 30 Wis. 605, but it will easily be found that the only point determined there was that a plain, unambiguous written contract cannot be varied by parol. The written contract was that plaintiff should do such ballasting from Brookfield to Milwaukee at a specified price as defendant should wish to have done, and such grading of the depot grounds in Milwaukee at a certain price as defendant might desire. The plaintiff attempted to prove by parol that the ballasting and grading to which the contract referred included all such work required at the points designated. No question was raised but that if the court were permitted to go outside of the language used by the parties to determine the meaning of the contract, by reason of ambiguity, and it were properly made to appear that the parties contracted with reference to a particular amount of work, their intention in that regard would be as effectually a part of the contract as if plainly written into it. The difficulty was that neither in the language of the contract, nor in its application, did there appear to be any obscurity calling for the application of rules of construction. That does not apply, in our judgment, to this case, as will be shown later. It will also be seen that want of mutuality was not the turning point in *Wells v. M. & St. P. R. Co.* It was not questioned but that Wells, having entered upon his work, was bound to proceed so long as the railroad company desired his services. *Boden v. Maher*, 95 Wis. 65, was a similar case.

Now to determine whether there was an enforceable contract between the parties we must first see what the precise nature of the agreement was. The suggestion made in *Wells v. M. & St. P. R. Co.*, that plain language does not admit of construction, does not apply here. The written

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proposition was to furnish stone, delivered on the street in the city of Waukesha in such quantities as defendant might desire. If we look at the language and say because there is no uncertainty of expression there is no use for construction, we fail to apply the rule that obscurity, calling for construction, may spring from the consequences of a literal application of the plain, ordinary meaning of words, as well as from the meaning of words themselves. *State ex rel. Heiden v. Ryan*, 99 Wis. 123. We must assume that when parties attempt to contract they purpose making a binding agreement. So, when the literal sense of their language leads to a contrary result there is at once presented a situation which requires the court to look at such language from the standpoint the parties occupied at the time of using it, and if it thereby appear that the real intent was to make a binding contract, and that the language used to effect that purpose will reasonably admit of a construction which will effectuate it, that intent will be considered a part of the contract just the same as if within the literal meaning of its language. That rule is so elementary that we hesitate to spend time in support of it. Its application to this case frees it from all difficulty.

In *Sigerson v. Cushing*, 14 Wis. 527, Mr. Justice PAINE said, "It is often absolutely essential that the court should know the facts surrounding the parties, and the situation in which they are placed, in order to interpret the meaning of what they say in their contracts." In *Nilson v. Morse*, 52 Wis. 240, quoting from the opinion of RYAN, C. J., in *Lyman v. Babcock*, 40 Wis. 503, which however merely stated with approval an elementary rule laid down in Greenleaf on Evidence, it was said, "As it is a leading rule in regard to written instruments that they are to be interpreted according to their subject matter, it is obvious that parol or verbal testimony must be resorted to in order to ascertain the nature and qualities of the subject to which



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the instrument refers. Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it. Whatever, therefore, indicates the nature of the subject is a just medium of interpretation of the language and meaning of the parties in relation to it and is also a just foundation for giving the instrument an interpretation, when considered relatively, differing from that which it would receive if considered in the abstract." It will be easily seen that the rule indicated is as well established as that other rule that a written contract cannot be varied by parol, which was the one applied in *Wells v. M. & St. P. R. Co.*, *supra*, and properly so.

The rule under discussion has been freely applied by the courts when the language, though free from any ambiguity of expression, if given its literal sense, without regard to the particular circumstances in the minds of the contracting parties when it was used, would result in failing to make a reasonable, binding contract. A good illustration of this is *Nash v. Towne*, 5 Wall. 689, where there was a sale of flour without anything in the bill of sale as to time, place, or manner of delivery, and the court held that evidence was proper regarding all the circumstances of the transaction, including a letter which the vendor sent to the vendee with the bill of sale, stating that the flour was sold free on board the steamer at Neenah, and was stored safely and insured. In view of the season a steamer to transport the flour was not obtainable till the opening of navigation the following spring, and the court therefore interpreted the words "free on board steamer at Neenah" and the words indicating that the flour was safely stored and insured, to mean that the real engagement of the vendor was that he would safely keep the flour till the opening of navigation and then engage a steamer to transport it, and deliver the flour on board such steamer free of charge. The court said that the con-

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tract being made in winter, and for transportation by water, it was unreasonable to suppose an immediate delivery was contemplated; and that, the flour being safely stored in the warehouse and insured, it was unreasonable to suppose that the parties contemplated that the property would be removed therefrom till the proper time for shipment in the manner contemplated, and that the words "free on board" meant that the vendor would employ a steamer and place the flour thereon free of charge. The general principle applied in reaching the conclusion was stated by Mr. Justice CLIFFORD thus: "Courts, in the construction of contracts, look to the language employed, the subject matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge the meaning of the words and of the correct application of the language to the things described." To the same effect are *Merriam v. U. S.* 107 U. S. 437; *Minnesota L. Co. v. Whitebreast C. Co.* 160 Ill. 85; *Wells v. Alexandre*, 130 N. Y. 642; *Minneapolis M. Co. v. Goodnow*, 40 Minn. 497; *Cooper v. Lansing W. Co.* 94 Mich. 272; *Robson v. Miss. River L. Co.* 43 Fed. Rep. 364; *S. C.* 61 Fed. Rep. 893; *U. S. v. Peck*, 102 U. S. 64; *Canal Co. v. Hill*, 15 Wall. 94.

In some of the cases cited all the elements are present that exist in the contract before us. The suggestion made in the opinion of the court, that they differ from the instant case and from *Wells v. M. & St. P. R. Co.* 30 Wis. 605, in that they refer to the sale and delivery of a specific article or a number of articles, or specific amount of services or material, or at the time of the contract the number of such articles or the amount of such services or materials were ascertainable, is viewed with some surprise, since the question

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was not suggested in the *Wells Case*, the only question being whether the terms of a written contract can be varied by parol, and since the court failed to note that such suggested necessary element was discovered in the numerous cases referred to, by the application of the rule of construction for which we contend, and which, if applied here, will make the contract in question as definite as any involved in such cases. For instance, in *Minnesota L. Co. v. Whitebreast C. Co.* 160 Ill. 85, the contract was for all the coal the vendee desired for the use of its boats for the season. The court said, in substance, that viewing the language of the contract in the light of the circumstances under which it was made, and the object of it, giving effect rather to the clear intent of the parties than to the literal sense of their words, it called for all the coal necessary to operate the boats for the season, and was binding. The other cases cited are along the same line.

It follows, in our judgment, very clearly, that it is the duty of the court to view the contract in question from the precise standpoint that the parties to it occupied when making it. The very fact that the literal sense of the words would not make a binding contract is enough in itself, as has been seen, to call for the course indicated. It cannot be assumed that the parties intended to do such an unbusiness-like thing as to reduce their agreement to writing, and yet have it of no effect except so far as actually executed. The parties were practical business men. We must assume that they had a well-defined, reasonable purpose in view, and intended to bind themselves accordingly. If that purpose can be clearly discovered, and is within the reasonable meaning of the language they used, looking at it from the standpoint they occupied in making the agreement, that meaning should be deemed to be a part of it. Defendant had a contract for paving and concreting Main street in the city of Waukesha. The unmistakable object of the contract with plaintiff was

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to obtain the stone required for that work, delivered on the particular street to be improved, when and where needed. The language of the contract does not specify a particular street. For aught that appears, delivery on any street of the city was sufficient. Placing ourselves, however, in the situation of the parties, it is easily seen that "delivery on the street" meant when and where required for use on the particular street under contract. The term "in such quantities as may be desired" is an indefinite term when viewed apart from the obvious purpose of the contract; but in the light of all the circumstances it is clear that it was used to express the purpose of the parties that the plaintiff should furnish all the stone that might be needed from time to time for the work on the street to be improved. With that construction, the contract is free from all difficulties which my brethren found in it. It has the essential of mutuality, the essential of a consideration of each party to support the promise of the other, and the element of definiteness, so far as necessary within the rule that all agree is elementary. Supplying the words necessarily implied because of the obvious intent of the parties, the accepted offer is substantially as follows:

*To Mr. G. Maffioli* — DEAR SIR: We propose to furnish all the crushed stone at 85c. per yard of 2,500 lbs., 30 in. x 4 in. curbing including corners, at 34c. per lineal foot, protection curb 15 in. x 4 in. at 10c. per lineal foot, all as per specifications, the stone to be delivered on the street in the city of Waukesha you now have under contract to pave and concrete, which may be required to carry out such contract. The stone to be delivered as aforesaid in such quantities from time to time as may be needed for such work.

So viewing the contract, the defendant was unquestionably entitled to counterclaim in this action for the damages sustained by him because of the refusal of the plaintiff to

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carry out its provisions, and the judgment should be reversed for that reason.

BARDEEN, J. I fully concur in the foregoing opinion of Mr. Justice MARSHALL.

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BURNS, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

*November 8 — November 24, 1899.*

*Railroads: Delays in transporting horses: Negligence: Failure to feed and water: Interstate commerce: Contributory negligence: Delay in unloading.*

1. Where the route over which horses are shipped is not a continuous line, but a combination of various lines, not traversed by any train for the whole distance continuously, the shipper is charged with notice of delays at junctions, indicated upon the scheduled time-tables, and such delays can form no ground for a charge of negligence against the carrier.
2. Where in such a case the carrier agreed to place the cars at the end of a private spur track which the shipper had a right to use by agreement with the owner, delay in transit occasioned by an agreement between such owner and the carrier that the spur should be used for switching in the afternoon only does not constitute negligence on the part of the carrier.
3. A provision in a special contract for the transportation of horses that the owner shall "bear the expense" of feeding and watering during transportation does not relieve the carrier from the obligation to furnish upon request the requisite opportunities for unloading the stock for that purpose, even though an employee of the shipper receives free transportation in order that he may care for them.
4. The fact that about 2:30 o'clock p. m., after the horses had been in the cars more than thirty-three hours, the owner told the carrier's agent at the station where the cars were then standing that the horses ought to be fed and watered, and that unless they reached their destination on the spur track before dark they could not be

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unloaded that night, is *held* equivalent to a request that the cars be placed at some point where feeding and watering could be done.

5. The carrier's agent in such a case is chargeable with notice of the length of time the horses had been in the cars.

6. Secs. 4386, 4387, R. S. of U. S. (providing that no railroad company carrying stock from one state to another shall confine the same in cars for a longer period than twenty-eight hours without unloading for rest, etc., for five consecutive hours, and that if the owner fails to feed and water the stock when unloaded the company shall do so at the owner's expense), imposes a duty upon the company for the benefit of the owners of stock transported, and failure to perform that duty constitutes actionable negligence at the suit of an owner who is injured thereby. The fact that a penalty is imposed for a breach of such duty does not prevent a civil action based on such negligence, the penalty not being given to the injured party in satisfaction for the injury.

7. It was not negligence for persons in charge of the horses, after their arrival in the morning at the station nearest the spur track upon which the cars were to be placed for unloading, to rely on promises by the carrier's servants and agents that the horses would be forwarded presently, nor to omit an attempt to unload and feed them at 2:30 p. m., when only two hours remained in which to do it.

8. Failure to unload the horses upon their arrival at the spur track after dark is *held* not to constitute negligence as matter of law, where the evidence showed that the night was dark and snowy; that the cars were in the woods, half a mile from the place to which the horses were being taken; that there were no conveniences for unloading, but temporary platforms would have to be erected; and that unloading them upon such platforms in the dark was a hazardous undertaking.

APPEAL from a judgment of the circuit court for Oconto county: S. D. HASTINGS, JR., Circuit Judge. *Reversed.*

This is an action for damages caused by alleged negligent delays in the carriage of two carloads of horses over the defendant's road, and by neglect to feed and water said horses while in transit. The facts were not greatly in dispute. It appears that on the 7th of January, 1896, the plaintiff shipped sixteen horses in two freight cars on the defendant's road at Oconto to Boyd's log track, in the state of

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Michigan, a distance of about 130 miles. This log track is a spur about three miles in length, owned by the Bergland Lumber Company, and used by that company and other lumbering concerns by their permission for getting logs out of the woods. It extends from the Channing branch of the defendant's road in northern Michigan, and branches off from the defendant's track at a point in the woods about seven miles north of a station called Sidnaw. The understanding at the time of the shipment was that the cars were to be placed at a point near the end of this private track. The horses were fed and watered at about 1 o'clock in the morning of January 7th, were then loaded upon the cars, and left Oconto at 5 o'clock a. m.; the horses in each car being in charge of an employee of the plaintiff. They were shipped under a written contract, which provided that there should be no liability for delay unless caused by gross negligence, and also that the owner or party in charge should bear the expense of feeding and watering the same during transportation. The contract also provided that the plaintiff's employees in charge of the stock should be transported without charge on the same train. There was a logging outfit, besides a considerable amount of hay and other feed, shipped in the cars with the horses.

At 5:30 o'clock a. m. the cars reached Oconto Junction, where they remained until 8 o'clock, waiting for the regular train going north on the main line. This train took them to Iron Mountain, Michigan, where they were cut out and left, because that train went through on the main line to Champion, and made no connection with the train on the Ontonagon branch, where these cars were going. They remained at Iron Mountain from about 1 o'clock p. m. until about 8 o'clock p. m., when they were put into a train and taken to Channing, which point was reached about 11 o'clock p. m. of the same day. They remained at Channing until 3 o'clock on the morning of the 8th, and were then taken

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upon the first train upon the Ontonagon branch, and left at Sidnaw at about 7 o'clock a. m. Here they were cut out of the train, and remained upon the side track until about 4:30 o'clock p. m., when a switch engine stationed at Sidnaw took them to Boyd's log track, and, after taking out the loaded cars from the track, placed the cars in question near the end of the track at about 7 o'clock in the evening.

The horses had no food or water during the entire trip. There were appliances for this purpose at Iron Mountain, but the plaintiff's employees in charge of the stock testify that they did not need food or water while there. There was also a movable chute for the unloading of horses at Sidnaw, and water could be easily obtained there, but the plaintiff's employees say that they did not see any platform or chute there, and it appears that the cars were not placed where the horses could be taken out. They did not ask that the cars be placed at any chute or platform, or that they should be fed or watered; and give as a reason for this that the agent at Sidnaw told them on their arrival that the cars would be taken to the logging track at 8 or 9 o'clock a. m., and that, not being taken at that time, they went to the agent again at about 11 o'clock, and he told them they would be taken right after dinner, and that between 2 and 3 o'clock p. m. the agent finally told them they would not be taken until after the passenger train went south. The plaintiff himself arrived at Sidnaw by passenger train at 11 o'clock a. m. of the 8th, while the horses were still there, but he made no effort to feed or water the horses, nor did he directly demand of any of the defendant's employees that the horses be placed at a chute at Sidnaw, but he testifies that he told the agent at about 2:30 o'clock p. m. that the horses ought to go somewhere where they could be fed and watered, and that, if they did not get to their destination before dark, they could not be unloaded that night. The plaintiff gives as

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the reason for not saying anything to the station agent before 2:30 o'clock p. m. that he thought the cars would be taken to their destination at any time, and that he was so informed by the men in charge of the horses. At about 2:30 o'clock p. m. he was told by the agent that the cars would not be taken to their destination till after the passenger train went south, which was about 4:30 o'clock p. m.

The reason given by the defendant for leaving the cars at Sidnaw was that Boyd's log track is a private logging road, owned by the Bergland Lumber Company, and that the agreement between the said company and the defendant was that no switching was to be done upon said private track in the morning, because cars were then being loaded at various places along the track, and switching would greatly hinder the loading of cars. It appears that the Sidnaw switch engine went upon the track after dinner, and took out as many loads as possible before the main line had to be cleared for the passage of the regular passenger train at 4:30 p. m. Immediately after the passage of that train, the balance of the loaded cars were taken out, and the cars in question were set in upon the track. After the cars were placed at their destination in the woods, it was dark and snowy and somewhat stormy, and there were no facilities for unloading the horses at that point, so the plaintiff left the horses until the morning of the 9th, when temporary platforms were constructed, and the horses taken out and fed and watered. The horses were seriously injured in health, and rendered unfit for work for a time.

Upon these facts the court directed a verdict for the defendant, and the plaintiff appeals.

For the appellant there was a brief by *W. H. Webster*, and oral argument by *D. G. Classon.*

For the respondent there was a brief by *Greene, Vroman, Fairchild, North & Parker*, and oral argument by *C. E. Vroman.*

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WINSLOW, J. The evidence clearly shows that the transportation of the horses from Oconto to Sidnaw proceeded according to the ordinary and regular course of train. The route from Oconto to Sidnaw was not a continuous line, but a combination of various lines connecting at junctions, but not traversed by any train for the whole distance continuously. At these junctions there were delays of hours at a time, which were indicated upon the scheduled time-tables of the defendant company, and of which shippers must take notice, and which, consequently, can form no ground for a charge of negligence. *Lowe v. E. T., V. & G. R. Co.* 90 Ga. 85; *Schwab v. Union Line*, 18 Mo. App. 159.

The delay at Sidnaw was under somewhat different circumstances. The cars could have been taken along by the train which left them at Sidnaw to the lead of Boyd's log track, and placed upon that lead just off the main track; but this was not the place where it was understood they were to be placed. The understanding was by all parties that they were to be placed at the further end of the log track, nearly three miles distant. This is the only reasonable construction of the contract of shipment in the light of the surrounding circumstances, and this could not be done by the heavy freight engine drawing the train, because the log track was full of steep grades and curves and was not fitted for the passage of such an engine. Nor was there any request by those in charge of the horses that the cars be left on the lead. Hence the cars were left at Sidnaw, to be taken to the place of destination by the light switch engine which was there stationed. The evidence is conclusive that this log track was a private track, owned by the Bergland Lumber Company, which concern had, by contract, given the Holt Lumber Company the right to use it for logging operations at the time in question. The plaintiff was about to do logging for the Holt Lumber Company, and on that account only had the right to have his cars placed upon the log

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track. The agreement between the Bergland Company and the defendant as to the switching upon this track was that such switching was only to be done in the afternoon, because switching in the morning would seriously interfere with the loading of cars, which was proceeding at various places along the track. It was by reason of this agreement that the plaintiff's cars were not taken up to the place of destination at the end of the log track until late in the afternoon, and thus it appears that they reached the desired point in due and regular course of train. The Bergland Company, being the owners of the track, certainly had the right to stipulate as to the manner of its use. So we conclude that there was no negligence shown on the part of the defendant in the various delays in transit.

But it is claimed that the defendant should have fed and watered the horses, and was negligent in failing so to do. The evidence shows that the horses did not need to be fed or watered when they stopped at Ironwood, and the only place where it can be reasonably claimed that they should have been fed and watered is at Sidnaw, where they remained from 7 o'clock a. m. until nearly 5 o'clock p. m. The evidence is undisputed that the horses were loaded so closely head and tail that it was impossible to feed or water them on the cars, and that it would have been necessary to unload them from the cars for that purpose. The rule of common law is that, in the absence of special contract, the carrier is bound to feed and water live stock transported by it at proper intervals. 4 Elliott, R. R. § 1553. Special contracts are frequently made by which the owner assumes the duty to feed and water, and such contracts are valid and will be enforced; the duty of the carrier in such case being discharged when it furnishes the owner or person in charge reasonable opportunities for feeding and watering in transit. *Abrams v. M., L. S. & W. R. Co.* 87 Wis. 485. In the present case the special contract under which the horses were

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shipped provides that the owner shall "bear the expense" of feeding or watering the stock during transportation. This provision varies the common-law duty of the railway company to the extent of its terms reasonably construed, but no more. The extent of that variation in terms is simply that the owner shall bear the expense of feeding and watering. Certainly there is no reasonable construction of those words, considered alone, which would relieve the railway company from the duty of placing the cars where the horses could be unloaded by the person in charge in a case like the present, where the evidence shows that the horses could not be fed or watered while on the cars. It is argued, however, that because the plaintiff had a man in charge of the horses, who received free transportation in order that he might look after them, the entire contract should be construed as meaning that the man in charge, or owner, assumed the duty of unloading to feed and water the stock, if unloading be necessary for that purpose. Conceding that such should be the proper construction of the contract, the company would still be obliged to furnish upon request the requisite opportunities for unloading the stock preparatory to feeding and watering. *Abrams v. M., L. S. & W. R. Co., supra.* The owner testifies positively (and his evidence seems to be undisputed on this point) that he told the agent at Sidnaw at 2:30 o'clock p. m. that the horses ought to go somewhere to be fed and watered, and that, if they did not get to their destination before dark, they could not be unloaded that night. The agent was charged with knowledge that the horses had then been on the cars more than thirty-three hours, and it seems to us that this statement, though somewhat indefinite, was equivalent to a request that the cars be placed at some point where such feeding and watering could be done.

Another consideration arises here, however, which does not seem to have been called to the attention of the trial

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court. This was an interstate contract of carriage. Sec. 4386 of the Revised Statutes of the United States provides, in substance, that no railroad company carrying cattle, sheep, swine, or other animals from one state to another shall confine the same in cars for a longer period than twenty-eight consecutive hours without unloading the same for rest, water, and feeding for a period of five consecutive hours, unless prevented from so doing by storm or other accidental cause. Sec. 4387 provides that the owner or person in charge of the stock shall feed and water the same when so unloaded, and, if he fails so to do, the railroad company shall feed and water them at the expense of the owner or person in charge, and have a lien on the animals therefor. Subsequent sections provide for the recovery of a penalty by action in the name of the United States for failure to comply with any of the provisions of the two sections. There can be no doubt of the application of these sections to the present case. Under them it became the duty of the railroad company in this case to unload the horses for a rest of five hours at 9 o'clock a. m. on the morning of the 8th, while they were waiting at Sidnaw, and this duty depended on no demand or request by the owner. The law was doubtless passed for humanitarian reasons largely, but also evidently for the protection of owners of stock transported. It imposes a duty on the railroad company for the benefit of such owners, and, under familiar principles, failure to perform such duty constitutes actionable negligence at the suit of an owner who is injured thereby. Nor does the fact that a penalty is imposed for breach of such duty take the place of a civil action based on the negligence, unless such penalty be given to the injured party in satisfaction for the injury. *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360; *Klatt v. N. C. Foster L. Co.* 97 Wis. 641. Actions for negligence, based upon the nonperformance of this statutory duty, have been sustained by the courts of last resort in Massachusetts and Virginia

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upon very satisfactory reasoning. *Brockway v. Am. Exp. Co.* 168 Mass. 257; *Chesapeake & O. R. Co. v. Am. Exch. Bank*, 92 Va. 495. In the first of these cases it is said: "Under the statute above referred to it was the duty of the railroad company to unload and feed and water them [the stock] without a request from their custodian if he failed to do it." And it was further held in that case that a failure to perform such duty might become gross negligence. It is evident, therefore, that there was sufficient proof in the present case to take the case to the jury upon the question of negligence on the part of the railroad company.

But it is strenuously claimed that the evidence shows contributory negligence on the part of the plaintiff, both in failing to attempt to unload and care for the horses at Sidnaw and in failing to unload them at night after they reached their destination. We are unable to say that contributory negligence appears, as a matter of law, at either place. At Sidnaw the evidence of the plaintiff shows that up to 2:30 o'clock p. m. the persons in charge of the horses were put off with promises that the cars would be presently forwarded; and it seems unreasonable to say that it was necessarily negligence for the plaintiff to rely on such promises, or to omit an attempt to unload and care for the horses when only two hours remained in which to do it. As to the failure to unload the horses after they reached their destination, the evidence shows that it was dark and snowy; that the stopping place was in the woods, nearly or quite half a mile from the logging camp, where there were no conveniences for unloading, but where temporary platforms for that purpose would have to be erected. There was also evidence tending to show that to attempt to unload them after dark upon a temporary platform was a hazardous undertaking, in the course of which the horses would be liable to break their legs or otherwise injure themselves. Upon the whole evidence we think it was a proper question for the jury

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whether the plaintiff, in waiting until daylight before unloading the horses, was guilty of contributory negligence.

No other questions are necessary to be considered.

*By the Court.*— Judgment reversed, and action remanded for a new trial.

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CUMPS, Appellant, vs. KIYO and wife, Respondents.

*November 8 — November 24, 1899.*

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*Mortgage: Deed absolute in form: Legal title: Reconveyance unnecessary: Notice: Homestead: Waiver of wife's right: Estoppel.*

1. Where a deed of land, absolute in form, and a contract back were executed for the sole purpose of securing a loan, the legal title did not pass but remained in the grantor the same as if the conveyance had been in form a mortgage.
2. Upon payment of the loan in such a case no conveyance back is necessary, the grantor being entitled only to demand the execution of such an instrument as would satisfy the mortgage of record.
3. The fact that property worth $575 had been conveyed by deed for an indicated consideration of $125, and that at the same time a contract back had been executed, specifying the same amount as the purchase price, in connection with the fact that the grantors in the deed continued in possession of the property, is *held* to have been sufficient notice that the transaction created the relation of mortgagor and mortgagee between the parties to put a purchaser upon inquiry which would have disclosed the facts.
4. Cancellation of the mortgage feature of the transaction in such a case, as by a satisfaction of the land contract on the record thereof, would not divest the mortgagor of the legal title and vest it in the mortgagee.
5. Sec. 2203, Stats. 1898 (providing that "no mortgage or other alienation by a married man of his homestead . . . shall be valid or of any effect as to such homestead without the signature of his wife to the same"), was not intended to give the wife a mere personal right which she might waive, or be estopped by her conduct from insisting upon, but to protect the home for the benefit of the family and every member of it. Therefore, where a deed, absolute in form, of a homestead was in fact a mortgage, the rights of the

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mortgagee or those claiming under him could not be enlarged by any acts of the mortgagors other than a literal compliance with the statute, both as to the fact of consent and the manner of manifesting it.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

Action of ejectment. Defendants, who are husband and wife, occupied the disputed premises as a homestead during all the times hereinafter mentioned. They conveyed such premises by deed, absolute on its face, to one Dieterville to secure a loan of $125 and interest thereon, payable in one year, taking back a land contract in the ordinary form, specifying the purchase price as $125, payable in one year with interest. Before the debt became due, defendant *Denis Kiyo*, his wife consenting, agreed to sell the premises to Peter April for $575. The latter borrowed the money of the plaintiff to pay for the property. For the purpose of consummating the agreement mentioned, *Denis Kiyo* indorsed a satisfaction of the land contract on the record thereof, and Dieterville, at the request of *Kiyo* and of April, made a deed of the premises to plaintiff, the latter advancing the purchase money, sufficient of which was paid to Dieterville to satisfy his claim, and the balance to *Kiyo*, who paid $160 thereof to his wife upon returning home. *Mrs. Kiyo* was not present when the transaction took place, but consented thereto in advance. Plaintiff based his right to recover possession of the premises on the deed made to him by Dieterville, as before stated. Judgment was rendered for the defendants.

For the appellant there was a brief by *Wigman & Martin*, and oral argument by *P. H. Martin*. They contended, *inter alia*, that conceding that the transaction was intended to secure a debt, yet Dieterville was the holder of the legal title in trust for *Kiyo*, and he could convey it as *Kiyo* might direct. *Glendenning v. Johnston*, 33 Wis. 347; *Smith v. Crosby*, 47



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Wis. 160; *Phelan v. Fitzpatrick*, 84 Wis. 240; *Swift v. State L. Co.* 71 Wis. 476; *Gruber v. Baker*, 9 L. R. A. 302; *Maxfield v. Patchen*, 29 Ill. 42; *Carpenter v. Carpenter*, 70 Ill. 457; *Rice v. Rice*, 4 Pick. 350; *Shubert v. Stanley*, 52 Ind. 46; *Falis v. Conway M. F. Ins. Co.* 7 Allen, 46. An absolute conveyance, though made to secure a debt, transfers to the grantee the legal title, and a reconveyance is necessary. *First Nat. Bank v. Tighe*, 49 Neb. 299; *Gallagher v. Giddings*, 33 Neb. 222; *Baird v. Kirtland*, 8 Ohio, 21; *Hughes v. Davis*, 40 Cal. 117; 1 Jones, Mortgages, § 339; *Kemper v. Campbell*, 44 Ohio St. 210; *Loring v. Melendy*, 11 Ohio, 355.

For the respondents there was a brief by *Sheridan & Evans*, and oral argument by *Philip Sheridan*.

MARSHALL, J. The points relied upon by appellant for reversal of the judgment are as follows: (1) Dieterville held the legal title to the land; therefore, though the purpose of the conveyance to him was to secure the payment of the debt owing by the grantor to him, he could convey the legal title to the premises to another by the direction of *Kiyo;* (2) when the debt to Dieterville was paid, *Kiyo* was entitled to a conveyance back of the property, hence could legally authorize its conveyance to a third person; (3) plaintiff dealt with *Kiyo* as the equitable owner without notice of the precise title held by Dieterville, and is therefore entitled to protection as an innocent purchaser relying on the record title; (4) even if the conveyance to Dieterville was intended as a mortgage, it was competent for *Kiyo* and Dieterville to cancel the mortgage feature, leaving the legal title in the latter free from such feature; (5) defendants are estopped from claiming that the interest of Dieterville was less than the full legal title, because all parties acted on that theory and defendants have received and retained the purchase money. The several points indicated will be briefly discussed.

1. There is no question on the record but that the convey-

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ance to Dieterville and contract back were executed for the sole purpose of securing the latter for money loaned by him to the former. Therefore, his interest was that of a mortgagee. The legal title did not pass by the *Kiyo* deed. It remained in *Denis Kiyo* the same as if the conveyance had been in form what it was in fact, a mere mortgage. In determining whether an instrument, or several instruments forming a single transaction affecting the title to real estate, constitute a mortgage, reference must always be had to their purpose, not their form. If such purpose be that of security merely, no matter what the form adopted to effect it, in law the relation between the parties, created by the transaction, is that of mortgagor and mortgagee, the legal title remaining in the former and a mere mortgage lien vesting in the latter. Therefore, the idea that Dieterville, by his deed to appellant, conveyed the legal title to the property in dispute because such was the character of his interest, cannot be sustained. *Brinkman v. Jones*, 44 Wis. 515; *Phelan v. Fitzpatrick*, 84 Wis. 240; *Merchants' & M. S. Bank v. Lovejoy*, 84 Wis. 601.

2. When the debt to Dieterville was paid, no conveyance of the legal title by him back to *Kiyo* was necessary, because such title never passed from the latter to the former, as before indicated. All that *Kiyo* was entitled to demand was a satisfaction of Dieterville's mortgage lien of record and the execution of such an instrument as was necessary to accomplish it. The payment of the debt *per se* extinguished the mortgage lien, leaving Dieterville with no greater interest than he would have had if his lien had been created by a mortgage in the usual form. The relation between the parties being that of mortgagor and mortgagee, the mere form by which that relation was created did not in any way affect the result of the payment of the mortgage debt. It was governed by the familiar rule that the payment of the debt extinguishes the lien, and that the

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making of a satisfaction of record is required solely for the purpose of having such record exhibit truly the facts. *Brinkman v. Jones*, *supra*; *Slaughter v. Bernards*, 97 Wis. 184. So the idea that after the payment of the debt to Dieterville he had the legal title to the property in dispute, which he could convey to *Kiyo* or any one else, is contrary to the well-settled law on the subject.

3. The contention that appellant dealt with *Kiyo* as the holder of a mere equitable title under the conditional sale contract, is not borne out by the evidence. The record title showed clearly that Dieterville's interest was that of a mortgagee. There was no mistaking the meaning of the deed from *Kiyo* to Dieterville of property worth $575 for an indicated consideration of $125, and the contract made back at the same time specifying a like amount as the purchase price of the property. Those facts pointed to the transaction as creating the relation of mortgagor and mortgagee with sufficient clearness at least to have put any person of ordinary intelligence and prudence upon an inquiry, which would inevitably have discovered to the inquirer the exact facts. The circumstance that the *Kiyos* were in possession of the property, in connection with the condition of the record, was also notice of their interest as plaintiff could have discovered it upon an inquiry of them. Further, appellant knew that April dealt with *Denis Kiyo* as the owner of the property, and that the only interest Dieterville claimed was a lien to secure the payment of $125 of borrowed money due to him from *Kiyo*. Appellant did not act in the matter through any mistake of fact, but through mistake of the legal effect of a deed from Dieterville under the circumstances. He evidently supposed that, because Dieterville had received a conveyance in the form of a deed, he held the legal title and could convey it to a third person. In that he was in error, as we have seen.

4. The relation between *Kiyo* and Dieterville being that

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of mortgagor and mortgagee, as stated, the cancellation of the mortgage feature divested Dieterville of his entire interest in the premises. There was no way by which the mortgage lien could have been used to divest *Kiyo* of the legal title to the property, except by resort to one of the methods of foreclosure provided for by statute, unless defendants, by their conduct, could estop themselves from insisting on the true state of the title. Cases elsewhere to the contrary need not be reviewed, for the law of this state is too well established to admit of being questioned. *Slaughter v. Bernards, supra.*

5. The last contention is that defendants were estopped from claiming that the conveyance by Dieterville to the plaintiff did not transfer title to the property. It is a sufficient answer to such contention that the statutory policy of this state is that a wife shall possess an absolute veto upon the husband's power to alienate his homestead, and that she shall be conclusively presumed to have exercised it till the contrary appears by her voluntary act of joining with him and conveying such homestead, evidenced by her signature to the conveyance. Sec. 2203, Stats. 1898, provides that, "no mortgage or other alienation by a married man of his homestead, exempt by law from execution, shall be valid or of any effect as to such homestead without the signature of his wife to the same." Recognizing the disability thus created, this court has held that a mortgage of a homestead cannot be increased or revived after payment, except by a joint written agreement to that effect, signed by husband and wife. *Campbell v. Babcock*, 27 Wis. 512; *Spencer v. Fredendall*, 15 Wis. 666; *Dunn v. Buckley*, 56 Wis. 190; *Ferguson v. Mason*, 60 Wis. 377. Also held that if a husband and wife execute a mortgage, intended to cover the homestead, but which does not by reason of a mistake in the description of the property, such mistake cannot be corrected by the court even by consent of the wife, or in any

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way except by an instrument signed by her and her husband in the manner provided by statute. *O'Malley v. Ruddy*, 79 Wis. 147.

The policy of the statute indicated is not to give the wife a mere personal right for her personal benefit which she may waive, or be estopped by her conduct from insisting upon, but to protect the home for the benefit of the family and every member of it,— a beneficent policy of the highest character, calling for a broad, liberal application of the statute, so as to carry it out, fully, in letter and spirit. If it should be held that the homestead right is a mere privilege which the wife may waive, or which may be lost under the rules of equitable estoppel, a very efficient way would be open to evade and nullify the statute. Such right is placed high above the reach of any such dangers by the absolute disability to alienate the homestead in any manner, except by a joint conveyance of some kind, signed by the husband and wife. The disability of the husband to otherwise convey the homestead is as complete as if it were not alienable at all, and of the wife to otherwise consent to such alienation, as if she were a minor. The doctrine of this case and of those cited does not militate against the capacity of the wife to be affected by an equitable estoppel, as to whether specific property is or is not a homestead, or from denying that a paper signed by her, covering the homestead, was so intended. *Nelson v. McDonald*, 80 Wis. 605. The limit of the doctrine declared and applied is that the law of estoppel cannot take the place of the statutory requisite to alienation. Here, though there was an alienation of the land in form to Dieterville, there was none in fact. The parties knew, or ought to have known, that his rights were those of a mere mortgagee and that there was no way of enlarging his interest or the interest of any one claiming under him, except by a compliance with the statute; that, the statute being imperative, the only way it can be satisfied is by a

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literal compliance with it, both as to the fact of consent and the manner of manifesting it. Rice, Real Prop. 945; *Godfrey v. Thornton*, 46 Wis. 677. Such was the holding of the trial court which resulted in the judgment appealed from, hence it must be affirmed.

*By the Court.*— So ordered.

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FRIEND, Administrator, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

*November 8 — November 24, 1899.*

*Railroads: Killing of child on track: Gate at farm crossing: Negligence.*

1. A railroad company which has constructed a gate at a farm crossing, safe and ample for all ordinary purposes, is not chargeable with negligence because, by the owner's use of the roadway of the crossing, the ground under the gate had been worn down so far as to permit a child to creep under the gate and get upon the track.
2. Where a child is run over by a train at a point where the employees of the railway company had no reason to anticipate the presence of any person on or near the track, in order to warrant a recovery on the ground of negligence in the management of the train the employees must have been guilty of gross negligence or wanton or wilful misconduct.

APPEAL from a judgment of the circuit court for Marinette county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

The action is brought to recover damages for the death of plaintiff's infant daughter, Gertrude, by one of defendant's passenger trains, on November 6, 1897, plaintiff suing in his capacity as administrator. The negligence charged is based on two grounds: first, that defendant was negligent in keeping up the fence and a gate at a farm crossing on premises near the house where the plaintiff lived; second, in negligently running the train by which the child was killed. The

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sufficiency of the complaint is directly challenged, but the view taken of the case renders it unnecessary to determine that question. After the evidence of plaintiff was all in, the defendant made a motion to direct a verdict for defendant, which was granted by the court on the ground that plaintiff had not made out a case that would entitle him to recover. It is to test the correctness of this ruling that this appeal is taken.

For the appellant there were briefs by *Quinlan & Daily*, and oral argument by *W. B. Quinlan*.

For the respondent there was a brief by *Fish, Cary, Upham & Black*, attorneys, and *Edward M. Hizer*, of counsel, and oral argument by *John T. Fish*.

BARDEEN, J. If this court shall be of opinion that plaintiff's proofs were not sufficient to entitle him to recover, the judgment of the court below must be affirmed. With the determination of this question in view, we will consider the testimony. Plaintiff lived on a farm through which defendant's road was operated. His house was a short distance from the right of way. Nearly in front of his house there was a gate in the right-of-way fence to a farm crossing leading to a highway on the other side of the track. This gate was made of boards and was of the kind in general use, known as a "slide and swing gate." The fence on either side of the gate posts was of barbed wire. On one side the lower wire was near the ground, with a space between that and the next wire above of seventeen inches. On the other side the similar wires were about twelve inches apart. When the gate was closed and in its usual position there was a space of about fifteen inches between the lower board and the ground, at a point where it had been worn down by the passage of teams and stock through the opening. This was plainly shown by the photographs in evidence. The deceased child was seventeen months old. Its

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mother was away from home. The father left home about 1:30 in the afternoon, leaving the child in the charge of his two stepdaughters. The children were playing in the door-yard with some neighbor's children. After a time the deceased child was missed by her playmates, and was discovered on the railroad track, a short distance below the crossing, just as the train approached. No evidence was offered as to how the child got upon the track. Whether she went under the gate or through the fence is a pure matter of speculation. All the reasonable probabilities are that she went under the gate. The traveled track led directly to that point. The opening was of sufficient size to allow her to pass under the gate without difficulty. It is argued, however, that the defendant is liable for the death of the child, no matter whether she passed upon the track through the fence or under the gate. This assumes that it was the duty of defendant to keep the track or path of the farm crossing in repair, as well as the fence and gate adjoining the plaintiff's premises. No such duty is enjoined by statute, and we know of no rule of law that imposes such duty upon defendant. Admitting for the purpose of the argument that the fence was defective, unless it is shown that the accident occurred by reason thereof there was no ground for recovery. The gate was safe and ample for all ordinary purposes; that is, for all purposes for which such structures are usually designed. The defendant had discharged its full duty when it erected the gate as described, and had no obligation to change its form or location to conform to the changed conditions caused by the plaintiff's use of the place, unless such use was of such a character as to make the gate an unsafe structure under the statute. Whatever defect there was at this place was created by the plaintiff; and he cannot be allowed to charge others for his own negligent act. The child may have entered, and probably did enter, upon the track through the opening created by plaintiff him-

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self. Under these circumstances, the defendant sustains no liability to him for the death of the child.

Nor can we believe that under either the allegations or the proof is there any liability shown as to the negligent running of the defendant's train. There is no claim that the accident happened at a place where the railroad employees had any reason to anticipate the presence of any person on or near the track. Neither is it suggested that the engineer was guilty of gross negligence or wanton conduct in the management of the train. On the contrary, it affirmatively appears that the moment the child was discovered he used the emergency application of the air brake, but was unable to stop the train in time to prevent the accident. Under these circumstances, little more remains to be said. The rule is settled in this state that under such conditions the railroad company can only be held for gross negligence or wanton or wilful misconduct of its employees. *Schug v. C., M. & St. P. R. Co.* 102 Wis. 515. There was no evidence that they were guilty of even a want of ordinary care. So upon both branches of the case the plaintiff must fail.

*By the Court.*— The judgment of the circuit court is affirmed.

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CITY OF DE PERE, Plaintiff in error, vs. HIBBARD, Defendant in error.

*November 9 — November 24, 1899.*

*Municipal corporations: Defective sidewalk: Incline: Snow and ice: Contributory negligence.*

1. A fall of one inch in ten in a stone apron leading from a sidewalk to a crosswalk, even though combined with a slight lateral inclination, is not an actionable defect.
2. There being no actionable defect on account of the incline in such apron, a slippery condition resulting from ordinary accumula-

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tions of ice, when such accumulations are smooth, does not constitute a defect.

8. It is contributory negligence for a traveler to go upon an inclined apron covered with smooth ice, knowing and appreciating its exact condition.

ERROR to review a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Reversed.*

For the plaintiff in error there were briefs by *E. F. Parker*, attorney, and *Greene, Vroman, Fairchild, North & Parker*, of counsel, and oral argument by *C. E. Vroman.*

For the defendant in error there was a brief by *Wigman & Martin*, and oral argument by *P. H. Martin.* To the point that under the circumstances it was a question for the jury whether the sidewalk in question was safe, they cited *Hill v. Fond du Lac*, 56 Wis. 248; *Kaples v. Orth*, 61 Wis. 533; *Morrison v. Madison*, 96 Wis. 452; *McNamara v. Clintonville*, 62 Wis. 207; *Paulson v. Pelican*, 79 Wis. 445; *Richards v. Oshkosh*, 81 Wis. 226; *Perkins v. Fond du Lac*, 34 Wis. 435.

WINSLOW, J. The defendant in error sued the city of *De Pere* for personal injuries resulting from a fall upon a stone apron leading from the sidewalk to the crosswalk upon one of the principal streets of the city of *De Pere.* The apron was composed of a single block of stone, three feet six inches wide, and six feet eleven inches long; one end being elevated to correspond with the sidewalk, and the other end being on a level with the street. The pitch of the stone from the sidewalk to the street was 8.4 inches, or about one inch in ten. There was also a slight lateral pitch to the stone, but hardly perceptible to the eye. The surface of the stone was practically smooth. On the morning of the accident, February 13, 1898, the stone was covered with smooth ice from one eighth of an inch to an inch in thickness. It was smooth and slippery. The defendant in error was fa-

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miliar with the stone, and walked up over it a few minutes before her fall, and testifies that she noticed the stone at that time, and that it was covered with ice, and was so slippery that she almost fell, and she knew its exact condition. In a few minutes she returned, and went down the stone, and slipped down sideways at about the center of the stone. A verdict was rendered for the defendant in error, and from judgment thereon a writ of error was sued out.

It is plain that the mere inclination of the apron, amounting to a fall of one inch in ten, even though combined with a slight lateral inclination, is not an actionable defect. It is not practicable to construct all sidewalks and crosswalks upon a dead level; there must be some slopes; and such inclination as was present here has been frequently held not to be an actionable defect. *Cook v. Milwaukee*, 27 Wis. 191. If there was no actionable defect on account of the incline, the slippery condition resulting from ordinary accumulations of ice in winter, when such accumulations are smooth, does not constitute a defect. *Beaton v. Milwaukee*, 97 Wis. 416. Had such accumulations become dangerously rough and uneven, and so continued for a sufficient time to import notice to the corporation, there might result a liability, but such a condition is not shown here. *Salzer v. Milwaukee*, 97 Wis. 471. It seems, also, that the defendant in error was guilty of contributory negligence in going upon the apron, for she knew and appreciated its exact condition. *Cooper v. Waterloo*, 98 Wis. 424.

*By the Court.*—Judgment reversed, and action remanded for a new trial.

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Notorious, uninterrupted, and unexplained possession of land up to a division fence for twenty years will thereafter be presumed to have been adverse to all the world, not excepting the neighbor across the fence. So far as *Fuller v. Worth*, 91 Wis. 406, may be construed to the contrary it is disapproved. *Wollman v. Ruehle*, 603

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## APPEAL AND ERROR.

*From what appeal may be taken.* See CERTIORARI, 1.

1. A final order in a civil contempt proceeding is one affecting a substantial right made in a special proceeding, and is therefore appealable. *State ex rel. Meggett v. O'Neill,* 227

2. A demurrer *ore tenus* is not a demurrer within the meaning of subd. 3, sec. 3069, Stats. 1898, which authorizes an appeal from an order which "sustains or overrules a demurrer;" and an appeal cannot be taken from a ruling sustaining a demurrer *ore tenus*, even though such ruling be embodied in a written order. *Mandelert v. Superior C. L. Co.* 423

3. An order of a lower court dismissing an appeal from justice's court in effect terminates the action and prevents a judgment from which an appeal may be taken, within the meaning of subd. 1, sec. 3069, Stats. 1898, and is therefore appealable. *Finlay v. Prescott,* 614

4. An order refusing to require amendment of the return to a writ of *certiorari* is not appealable. *State ex rel. Gray v. Common Council,* 622

*Notice of appeal: Service on clerk.*

5. A notice of appeal to the supreme court, delivered to the clerk of the circuit court for the purpose of complying with the appeal statute on that subject and having such notice filed and certified to this court as part of the record on appeal, which is so filed and returned, satisfies the statutory requisites of such an appeal as regards the serving of notice on such clerk and the return thereof to this court; and the clerk's filing on such notice sufficiently proves the facts. BARDEEN, J., dissents. *Mackin v. Madden,* 61

*Undertaking, when required: Executors.* See APPEAL, 21.

*Record: Bill of exceptions.* See PLEADING, 1.

6. Counsel have no right on appeal to found any argument upon, or bring into the case, a fact not disclosed by the record. *Schaefer v. Fond du Lac,* 39

7. The supreme court cannot entertain an appeal from a judgment unless a judgment roll made up in substantial compliance with sec. 2898, Stats. 1898, has been transmitted thereto as required by sec. 3050. *Barton v. Twohy M. Co.* 420

8. The supreme court acquires no jurisdiction of an appeal from an order if the return thereon fails in material particulars to comply with sec. 3050, Stats. 1898; as where the original of an essential paper is not included in the return and it does not appear that the court directed a copy to be substituted, and it does not appear, either from the clerk's certificate or from recitals in the order in connection with the papers transmitted, that the return contains the papers used by each party on the application for the order. *Superior C. L. Co. v. Superior,* 463

9. An appeal from an order will be dismissed unless the appellant has caused the order to be transmitted to the supreme court. *State ex rel. Gray v. Common Council,* 622

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10. Refusal to permit an unsuccessful party to file exceptions to the findings, and to extend the time within which to settle a bill of exceptions, after the time therefor had expired, is *held* not to have been an abuse of discretion, where the record failed to disclose any adequate excuse for the delay of over six months after the entry of judgment, or to show that a bill of exceptions would be of any advantage if settled. *Schluckebier v. Babcock*, 293

11. In the absence of a bill of exceptions, or of a certificate that the bill contains all the evidence, the only question, where the trial was by the court, is whether the pleadings and findings sustain the judgment. *Butler v. Gillis*, 421

12. The proofs and papers used on a motion which resulted in a judgment are not a part of the record on appeal from the judgment, unless made so by a bill of exceptions. *Ibid.*

*Questions considered: Exceptions.* See APPEAL, 19. CRIMINAL LAW, 27. EQUITY, 9.

*Correction of error before appeal: Dismissal.*

13. Where the entire error upon which an appeal is based was corrected, or the appellants' entire ground of complaint removed, by the action either of the adverse party or of the trial court, before the appeal was perfected,—in this case by the filing of the respondent's consent that the judgment in his favor should be vacated and judgment be entered dismissing his complaint or affirming the validity of the special assessment attacked therein, with costs,—the appeal should be dismissed upon the fact being made to appear. *Hogan v. La Crosse*, 106

*Affirmance and reversal: Material and immaterial errors.* See CERTIORARI, 4. CRIMINAL LAW, 2–4, 6–12, 20. EVIDENCE, 2, 6, 7, 9, 12. HIGHWAYS, 2, 5. INSTRUCTIONS TO JURY. JUSTICES' COURTS, 1. MORTGAGES, 6, 7. MUNICIPAL CORPORATIONS, 8. NEGLIGENCE, 2. REPLEVIN, 5.

14. Where, in an action at law against an executor, plaintiff has judgment not only for all the property which he is entitled to recover in such an action but also for further relief as to other property for which the testator's estate would have been liable in some other form of procedure, such judgment will not be reversed for that reason on an appeal by the plaintiff. *Evans v. Kemp*, 87

15. A verdict supported only by testimony which is contrary to the great weight of the evidence and is impeached or rendered improbable by other conceded facts or is against all the reasonable inferences or probabilities in the case will not, on appeal, be permitted to stand, even though the trial court refused to set it aside. *Bank of Commerce v. Ross*, 91 Wis. 320, criticised. *Wunderlich v. Palatine F. Ins. Co.* 382

16. In a close case, repeated references by counsel in his argument to the jury to matters not in evidence, which have a tendency to influence the minds of the jury against the opposing party, may necessitate a reversal, even though the jury were directed to disregard them. *Ibid.*

*New trial after reversal: Remission of damages.* See DAMAGES, 5.

17. Where a judgment in favor of a plaintiff in a personal injury action is right as regards the legal liability of the defendant, but reversible because of the reception of irrelevant evidence tending to prejudice the jury and increase the amount of their verdict, and because compensation was allowed for a disability which does not in fact

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exist, the court may properly permit the plaintiff, at his election, to avoid a new trial by taking judgment for such sum as will, in the judgment of the court, do justice to the defendant. *Baxter v. C. & N. W. R. Co.* 307

18. In naming a sum for which plaintiff may take judgment in the cir cumstances above indicated, the right of the defendant to a jury trial is not invaded if the amount be placed as low as in all reasonable probability the jury found by their verdict, independent of the prejudicial elements. That is, the court in such a case should not undertake to say what sum of money will measure the plaintiff's loss, but what sum the jury said, by their verdict, stripped of its prejudicial elements and giving defendant the benefit of reasonable probabilities in respect to the amount of the recovery, will measure such loss. *Ibid.*

19. Where the evidence is insufficient to sustain certain findings of a special verdict, a new trial will be awarded on appeal unless the question of the appellant's right to judgment has been raised in the trial court by motion to set aside such findings and for judgment on the remainder of the verdict: *Keller v. Schmidt,* 596

*Effect of decision on prior appeal: Res adjudicata.* See JUDGMENT, 11, 13.

*Costs.*

20. Where several appeals are based on a single notice, costs should be taxed as on a single appeal. *State ex rel. Gray v. Common Council,* 622

*Appeal from county court: Undertaking: Executors.*

21. Until the person named in a will as executor has fully qualified as such and been confirmed in his office he is not an executor within the meaning of sec. 4032, Stats. 1898, so as to be exempt from giving an undertaking on appeal. *In re Will of Somervaill,* 72

*Appeal from justices' courts.* See APPEAL, 3. JUSTICES' COURTS.

APPEALABLE ORDERS. See APPEAL, 1–4. CERTIORARI, 1.

APPEARANCE *nunc pro tunc.* See ESTATES OF DECEDENTS, 8.

APPORTIONMENT of indebtedness, etc. See TOWNS, 4.

ARGUMENT to jury. See APPEAL, 16. CRIMINAL LAW, 27. VERDICT, 1.

ASSIGNMENT.
Of proceeds of litigation. See GARNISHMENT, 3.
Of contract. See TAXATION, 3. VENDOR AND PURCHASER, 5–7.
For benefit of creditors. See VOLUNTARY ASSIGNMENT.

ASSISTANCE, Writ of. See RAILROADS, 4.

ASSUMPTION OF RISK. See MUNICIPAL CORPORATIONS, 13. RAILROADS, 26, 27.

ATTACHMENT. See LOGS AND LUMBER, 3.

ATTORNEYS AT LAW. See APPEAL, 6, 16. PARTNERSHIP.

BANKING LAW: Submission to people: Publication of notice. See ELECTIONS, 2.

BANKS AND BANKING. See BILLS AND NOTES, 4–6. SALE OF CHATTELS, 2.

BENEFIT SOCIETIES. See INSURANCE, 1–6.

BILL OF EXCEPTIONS. See APPEAL, 10–12.

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## BILLS AND NOTES.

See DURESS, 2. PRACTICE, 1.

1. Threats of an employer to prosecute an employee for embezzlement and send him to jail unless his wife would execute a note and a mortgage of her own property to secure her husband's debt constituted duress rendering voidable the note and mortgage so executed where the will of the wife was so overcome by the threats that the execution of the instruments was not her voluntary act. *Mack v. Prang*, 1

2. The defense that negotiable paper was executed under duress by threats of imprisonment of a relative is not available against a *bona fide* purchaser before maturity. *Ibid.*

3. One of two joint guardians of an infant, being unable to account for money of the ward which he had received, resigned his guardianship and turned over a note and mortgage, payable to him but not yet due, to the remaining guardian, who received them in payment *pro tanto*, at their face value, of the indebtedness of the payee to the ward. *Held*, that the remaining guardian thereby became a *bona fide* holder for value of the note. *Ibid.*

4. In order to establish the fact of agency for the collection of commercial paper, rendering payment, to the proper custodian of money at such agency, a discharge of the debt, possession of such paper when due and collectible, or evidence *aliunde* of express authority to the agent, is indispensable. *Bartel v. Brown*, 493

5. The mere naming in commercial paper of a place for the payment thereof, does not make the proper custodian of money at such place the agent of the owner of such paper to receive such payment. *Ibid.*

6. If a person, relying upon the fact that a place for the payment of his note is named therein, deposit there the money to pay the same, such money will remain the property of the payor till the note actually comes into possession of the depositee for the collection thereof, so that, if in the meantime the money be lost, such loss will fall on the depositor, as between him and the note holder. *Ibid.*

7. In an action by an indorsee of a promissory note, the consideration for which had failed, the evidence (stated in the opinion) is *held* sufficient to make it a question for the jury whether the plaintiff's ownership was *bona fide*, and whether such ownership commenced before the maturity of the note. *Thompson v. Brennan*, 564

8. A German farmer, who could not read or write English, executed a promissory note to lightning-rod agents for a sum which he himself had offered in settlement of their claim against him. He asked for no information as to the contents of the paper, although his son was present and could have informed him and he knew he was dealing with swindlers. *Held*, that he was guilty of negligence which would estop him from claiming relief against the note in the hands of a *bona fide* purchaser for value before maturity, even though the original claim was tinctured with fraud and he did not intend to sign a negotiable note therefor. *Keller v. Schmidt*, 596



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9. The defense that a negotiable note was obtained by duress of threats of suit is not available against a *bona fide* purchaser for value before maturity. *Ibid.*

BONA FIDE PURCHASER. See BILLS AND NOTES, 2, 3, 7-9.

BONDS. See ESTATES OF DECEDENTS, 4, 5.

## BOUNDARIES.

See ADVERSE POSSESSION.

The weight accorded to ancient fences as evidence of the true line between tracts of land is not so great where such line was not at any time marked by original monuments. *Wollman v. Ruehle,* 603

BURDEN OF PROOF. See HIGHWAYS, 6. INSTRUCTIONS TO JURY, 9.

CARRIERS. See RAILROADS, 5-18.

## CASES CRITICISED, DISTINGUISHED, ETC.

1. *Baker v. Baker,* 102 Wis. 226. See No. 29.

2. *Bank of Commerce v. Ross,* 91 Wis. 320 (as to new trial), criticised. *Wunderlich v. Palatine F. Ins. Co.* 382, 387

3. *Bigelow v. Danielson,* 102 Wis. 470. See No. 17.

4. *Bridge v. Ward,* 35 Wis. 687. See No. 26.

5. *Brock v. Dole,* 66 Wis. 142 (as to waste), distinguished. *Melms v. Pabst Brewing Co.* 13

6. *Carey v. Boyle,* 53 Wis. 574 (as to vendor's lien), distinguished. *Berger v. Berger,* 284

7. *Cole v. Getzinger,* 96 Wis. 559. See No. 29.

8. *Daniels v. Racine,* 98 Wis. 649 (as to notice of injury), distinguished. *Harris v. Fond du Lac,* 47

9. *Davis v. Dean,* 66 Wis. 100. See No. 29.

10. *Derse's Will, In re,* 103 Wis. 108. See No. 29.

11. *Eureka S. H. Co. v. Sloteman,* 67 Wis. 118. See No. 31.

12. *Eviston v. Cramer,* 57 Wis. 570; *Reed v. Keith,* 99 id. 672 (as to remission of damages), distinguished. *Baxter v. C. & N. W. R. Co.* 335

13. *Fuller v. Worth,* 91 Wis. 406 (as to adverse possession), disapproved in part. *Wollman v. Ruehle,* 603, 605

14. *Hiles v. Hanover F. Ins. Co.* 65 Wis. 585 (as to evidence), distinguished. *McGowan v. Supreme Court I. O. F.* 174, 186

15. *Keller v. Gilman,* 93 Wis. 9 (as to value of services), distinguished. *Selleck v. Janesville,* 571, 578

16. *Kellogg v. Steiner,* 29 Wis. 626. See No. 27.

17. *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352; *Bigelow v. Danielson,* 102 id. 470; *Ward v. C., M. & St. P. R. Co.* id. 215 (as to special verdict), distinguished. *Baxter v. C. & N. W. R. Co.* 315, 316

18. *Mason v. Ashland,* 98 Wis. 540 (as to costs), distinguished. *Finlay v. Prescott,* 616

19. *McFarlane v. Milwaukee,* 51 Wis. 691 (as to laches), distinguished and applicability doubted. *Schaefer v. Fond du Lac,* 39, 42

20. *North Hudson M. B. & L. Asso. v. Childs,* 86 Wis. 292. See No. 31.

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21. *Olson v. Luck*, 103 Wis. 33 (as to evidence), distinguished. *Conrad v. Ellington*, 367, 371

22. *Ransom v. C., St. P., M. & O. R. Co.* 62 Wis. 178 (as to warning), overruled in part. *Walters v. C., M. & St. P. R. Co.* 260

23. *Reed v. Keith*, 99 Wis. 672. See No. 12.

24. *Sullivan v. State*, 100 Wis. 283. See No. 25.

25. *Terrill v. State*, 95 Wis. 276: *Sullivan v. State*, 100 id. 283 (as to premeditated design), overruled. *Perugi v. State*, 231, 241

26. *Upman v. Second Ward Bank*, 15 Wis. 449; *Bridge v. Ward*, 35 id. 687 (as to vendor's lien on homestead), distinguished. *Berger v. Berger*, 285

27. *Walker v. Ebert*, 29 Wis. 194; *Kellogg v. Steiner*, id. 626 (as to promissory notes), distinguished. *Keller v. Schmidt*, 601

28. *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215. See No. 17.

29. *Watkins v. Brant*, 46 Wis. 419; *Davis v. Dean*, 66 id. 100; *Cole v. Getzinger*, 96 id. 559; *Baker v. Baker*, 102 id. 226; *In re Derse's Will*, 103 id. 108 (as to undue influence), distinguished. *Fox v. Martin*, 593–595

30. *Wolff v. Bluhm*, 95 Wis. 257 (as to duress), distinguished. *Mack v. Prang*, 5

31. *Yates v. Shepardson*, 37 Wis. 315; *Eureka S. H. Co. v. Sloteman*, 67 id. 118; *North Hudson M. B. & L. Asso. v. Childs*, 86 id. 292 (as to service of notice of appeal), distinguished. *Mackin v. Madden*, 63

## CERTIORARI.

See APPEAL, 4.

1. The supreme court will refuse to review by *certiorari* appealable orders and judgments, except in emergencies in which the remedy by appeal is inadequate. *State ex rel. Meggett v. O'Neill*, 227

2. The return to a writ of *certiorari* is conclusive upon the relator so far as it is responsive to the writ, and he cannot upon affidavits obtain an order in effect adjudging it untrue and requiring amendment. *State ex rel. Gray v. Common Council*, 622

3. After return it is proper to quash a writ of *certiorari* upon facts showing either that the discretionary power of the court to review the proceedings in question ought not to be exercised under the circumstances, or that the proceedings were with full jurisdiction and regularity, so that the writ, if continued to further hearing and judgment, would result only in an affirmance. *Ibid.*

4. Although upon a motion to quash a writ of *certiorari* an affirmance of the proceedings under review is irregular, the irregularity is not prejudicial where the writ is quashed because the return shows the proceedings to have been with jurisdiction and regular. *Ibid.*

5. Where there is nothing to indicate upon what ground a writ of *certiorari* is quashed, it will be inferred from words of affirmance in the judgment or order that it was quashed because the proceedings were with jurisdiction and regular. *Ibid.*

6. Upon *certiorari* to review proceedings of a common council in letting a contract for street sprinkling under a charter provision authorizing them to contract for sprinkling and to assess the cost thereof whenever a petition therefor is presented signed by the designated proportion of the taxpayers within the boundaries set

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forth in the petition, a return showing that the council, through one of its regular committees, investigated the question whether the petition contained the proper number of signatures, and decided it affirmatively by adopting the committee's report, is conclusive and would justify an affirmance, where the sufficiency of the signatures to the petition was the only question presented. *Ibid.*

CHARGING THE JURY. See INSTRUCTIONS TO JURY.

## CHATTEL MORTGAGES.

See SALE OF CHATTELS, 1. VOLUNTARY ASSIGNMENT.

In garnishment proceedings to reach a stock of goods which had been taken possession of under a chattel mortgage, it appeared, among other things, that the mortgagor and mortgagees were brothers; that the mortgagor remained in possession of the stock and conducted the business as before the mortgage was given, using the proceeds as he pleased; that the mortgagees were frequently about the store and knew the manner in which the business was conducted; and that only small payments were made by the mortgagor. *Held*, that these facts showed an implied agreement that the mortgagor might so act, which rendered the mortgage fraudulent and void as to other creditors of the mortgagor. *Charles Baumbach Co. v. Hobkirk*, 488

CIRCUIT COURTS. See TRUSTS, 4.

CITIES. See MUNICIPAL CORPORATIONS.

CLAIM for injury. See HIGHWAYS, 1.

CLERK OF CIRCUIT COURT. See APPEAL, 5.

COLLATERAL ATTACK. See JUDGMENT, 4.

COMMERCIAL PAPER. See BILLS AND NOTES.

COMMON CARRIERS. See RAILROADS, 5–18.

CONDEMNATION OF LAND, ETC. See RAILROADS, 1–4.

CONDITIONS precedent. See MUNICIPAL CORPORATIONS, 1–4. PARTNERSHIP, 1. TOWNS, 4. VENDOR AND PURCHASER, 8, 9.

CONFESSIONS. See CRIMINAL LAW, 24, 25.

CONFIDENTIAL RELATIONS. See VENDOR AND PURCHASER, 10. WILLS, 5.

CONSIDERATION. See CONTRACTS, 2. CORPORATIONS, 4. RAILROADS, 8.

## CONTEMPT OF COURT.

See APPEAL, 1.

Where the act charged as contempt is the nonpayment of money to another party, and the remedy prayed and granted is the compulsion of such payment by arrest and imprisonment until it is done, the proceeding is civil in its character. *State ex rel. Meggett v. O'Neill*, 227

CONTINUANCE. See PRACTICE, 1.

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## CONTRACTS.

See BILLS AND NOTES. CHATTEL MORTGAGES. CORPORATIONS, 2. DEEDS. DURESS. ELECTIONS, 4. ESTOPPEL. EVIDENCE, 2, 3. GUARANTY. HUSBAND AND WIFE. INSURANCE. LOGS AND LUMBER, 1, 2. MORTGAGES. PARTIES, 1–4. PARTNERSHIP. RAILROADS, 5–18. SALE OF CHATTELS. TAXATION, 3, 4. VENDOR AND PURCHASER.

1. A written contract by which plaintiff sold to defendant all the dirt on certain lots above a specified grade at six cents per cubic yard, and defendant agreed to remove it before a certain date, weather permitting, and to level up the lots and redistribute the black earth on the surface, is *held* to be an entire contract; and the making of a partial payment as the work progressed, which was not shown to have been at all proportional to the dirt removed or to have been intended otherwise than as an advance generally upon the gross sum ascertainable and payable only after full completion, does not indicate a contrary understanding by the parties. *Widman v. Gay*, 277

2. In an action upon an order for the payment of money out of a specified fund, brought by an indorsee who had notice that its consideration was the performance of a certain contract and that nonperformance was claimed, it was error to exclude evidence offered to prove such failure of consideration. *Woodward v. Smith*, 365

3. A written offer by plaintiff to furnish to defendant crushed stone and curbing at certain prices "as per specifications, delivered on street in the city of W. in such quantities as may be desired," was accepted without qualification. No specific reference was made in the writings to a contract which defendant had recently made for macadamizing a street in W. Defendant had, also, at the time, two other contracts for macadamizing in other cities, and some of the stone received from plaintiff was shipped elsewhere. It was admitted by defendant that he was not bound to receive from plaintiff all the stone required to complete the work in W., but only such quantities as he might desire. *Held*, that the contract did not bind plaintiff to furnish all the stone required for that work, but left the amount to be furnished unfixed and unascertainable, and that parol evidence was inadmissible to enlarge or modify its terms. MARSHALL and BARDEEN, JJ., dissent, being of the opinion that, inasmuch as the literal sense of the language used did not constitute the contract a binding agreement, it became the duty of the court to construe it from the standpoint occupied by the parties when making it, and that, so construed, its plain purpose was that the plaintiff should furnish all the stone that might be needed by defendant from time to time for the work upon said street in W. *Hoffman v. Maffioli*, 630

CONTRIBUTORY NEGLIGENCE. See HIGHWAYS, 6, 7. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 7, 12, 13. RAILROADS, 23, 26, 27.

CONVEYANCES. See EQUITY. MORTGAGES, 1–5. RELIGIOUS SOCIETIES, 1, 2. VENDOR AND PURCHASER, 10.

## CORPORATIONS.

See MUNICIPAL CORPORATIONS.

1. In an equitable action by stockholders of a corporation, suing as such on behalf of themselves and others similarly situated, on the ground that the governing body of the corporation refuses to pro-

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ceed, only a cause of action in favor of the corporation itself, not one belonging to individual members, can be enforced. *Jenkins v. Bradley,* 540

2. Tenants in common of lands quitclaimed them at an agreed valuation to a corporation organized by themselves, in exchange for full-paid stock. As to an undivided one-fourth interest in said lands certain of the grantors had the legal title, but merely as security for a debt. This fact was known to all, but all supposed that the debtor's interest therein had been forfeited or was of very little value, and stock purporting to be full paid was therefore issued for said one-fourth interest the same as for the other interests. It is claimed that at and prior to the organization of the corporation the grantors of said one-fourth interest agreed with another grantor, J., that they would indemnify and hold him harmless from any defect in the title to said one-fourth, and that said agreement was the consideration moving to J. for the conveyance to the corporation of his interest in the lands. *Held,* that such agreement, if made, was a personal agreement and did not inure to the benefit of, and could not be enforced by, the corporation. *Ibid.*

3. After the organization of the corporation the debtor above mentioned established his right to redeem said one-fourth interest in the lands. Thereupon the corporation purchased his interest at a fair price, paying therefor out of the corporate funds. All the directors voted for such purchase, but it is claimed that the representatives of J.'s estate so voted upon the assurance of the other directors that said estate should not be in any manner prejudiced thereby. *Held,* that such purchase, and the refusal of the grantors of said one-fourth interest to reimburse the company or J.'s estate on account of the failure of the title thereto, did not constitute a fraud upon the corporation. *Ibid.*

4. At the time said one-fourth interest was quitclaimed to the corporation the interest of the grantors therein was worth about $15.000, but all parties supposed it was worth the face value of the stock issued for it, which was $55,000. *Held,* that the title to the stock so issued did not fail entirely. *Ibid.*

5. Failure of title to said one-fourth interest did not give the grantors thereof the right to return the stock issued therefor to the company and, upon accounting for the benefits received on account of such holdings, to be relieved from further obligation. *Ibid.*

6. Having no election as to the holding of the stock issued for said one-fourth interest, the retention of such stock by the grantors of that interest and payment for the said debtor's interest therein out of corporate funds imposed no obligation upon said grantors beyond the obligation which arose from the failure of their title. *Ibid.*

7. The grantors of said one-fourth interest were promoters and directors of the corporation. All the parties supposed that, under a power of sale in the agreement with the debtor, said grantors could and did convey his interest to the corporation. In his action to redeem, said grantors set out that they had made such conveyance and had in their hands about $40.000 (being the difference between the amount due from him and the valuation at which said one-fourth interest had been taken by the corporation) to which he was equitably entitled. After it had been determined that they had conveyed only a mortgage interest to the corporation, they virtually admitted that they were liable to the corporation for said difference between the value of the mortgage interest and the amount of the stock issued therefor, and denied only that they

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were liable for the full amount paid by the corporation for the debtor's interest; and there was an understanding among the directors that the company was to be reimbursed on one basis or the other. *Held*, that said grantors were both legally and equitably bound to make good their stock on the basis of the difference between what they paid and what they received. *Ibid.*

8. Even if the cause of action in favor of the corporation arose against said grantors when the deed was made, yet the conduct of the grantors, and their subsequent recognition of liability, in connection with all the surrounding facts and circumstances, is *held* sufficient to show an agreement on their part to pay, and to take the case out of the statute of limitations. *Ibid.*

9. Though such liability of said grantors was to the corporation and was made to appear in an action brought by certain stockholders on behalf of the corporation, yet, all the parties interested being before the court, and it appearing that there had been individual settlements between said grantors and one stockholder and between certain of the grantors and the plaintiffs, so that it would be unjust to require the remaining grantors, who had not settled with plaintiffs, to pay to the corporation money for general distribution to the stockholders, a judgment against said grantors who had not settled and in favor of plaintiffs directly, for their share of the amount equitably due, is *held* proper, in order to prevent circumlocution and injustice. *Ibid.*

CORPUS DELICTI. See CRIMINAL LAW, 1.

CORROBORATION of confession. See CRIMINAL LAW, 25.

## COSTS.

See APPEAL, 20.

Where in an action at law plaintiff recovers judgment responsive to his complaint, though not to the full extent of his claim, the fact that the court includes in the judgment some further relief, equitable in its character, cannot deprive him of his statutory right to costs. *Evans v. Kemp*, 87

COUNTY BOARD. See ELECTIONS, 5. TOWNS.

COUNTY CLERK. See ELECTIONS, 4.

COUNTY COURTS. See APPEAL, 21. ESTATES OF DECEDENTS. TRUSTS, 4.

## COURT AND JURY.

See APPEAL, 15, 17, 18. BILLS AND NOTES, 7. INSTRUCTIONS TO JURY. INSURANCE, 2, 3. LOGS AND LUMBER, 1. MUNICIPAL CORPORATIONS, 6, 7, 14. NEGLIGENCE. PHYSICIANS AND SURGEONS, 1. RAILROADS, 18, 19.

1. When the facts proved, the probabilities, and all reasonable inferences are overwhelmingly against the plaintiff's case, the trial court should, on motion, direct a verdict for defendant. *Maanum v. Madison*, 272

2. A motion by each party to an action that a verdict be directed in his favor will not be construed as an admission or agreement that there is no issue of fact, or as a waiver of the right to have the facts passed upon by the jury and a submission thereof to the court. *Thompson v. Brennan*, 564

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8. Before directing a verdict the court must look at all the facts in the most favorable light for the other party in which the jury would be at liberty to find them, and then be able to say there is no evidence which would justify a verdict in his favor. *Ibid.*

COURTS. See RAILROADS, 8. TRUSTS, 4.

COVENANTS. See DEEDS. VENDOR AND PURCHASER, 8–10.

## CRIMINAL LAW AND PRACTICE.

1. The *corpus delicti*, and every element of it, in a criminal case may be established by circumstantial evidence as well as by positive or direct evidence, if such circumstantial evidence produces in the minds of the jury conviction, to a moral certainty, of the existence of all the requisite facts and excludes every other reasonable hypothesis. *Buel v. The State*, 132

2. The reception of irrelevant evidence against objection, prejudicial, if at all, by reason of an unwarranted use of it by counsel in addressing the jury or significance given to it by the instructions of the court, is not reversible error. *Ibid.*

3. The right of cross-examination extends to a reasonable inquiry into the previous life and character of the witness, so far as the same bears on the credibility of his evidence, and the extent to which such examination may be carried rests in the sound discretion of the court, though it is an abuse of judicial authority to allow questions to a witness as to irrelevant matters, regardless of whether there are any circumstances reasonably suggesting them or they reasonably bear on his credibility, and for the purpose of creating, or which are manifestly calculated to create, prejudice in the minds of the jury against the witness, and, if he be a party, influence them to find against him because of such prejudice. *Ibid.*

4. For the purpose of explaining the circumstance that soon after a homicide for robbery the supposed guilty party was much improved financially, he testified that a few months before the homicide he and the deceased conducted a profitable partnership business; and to rebut that the court permitted a memorandum book of the deceased in evidence, saying that it tended to impeach the evidence of the accused, which book did not show, definitely, that it was other than a personal memorandum book; there was no evidence that the accused ever saw or was in any way concerned with it: and it did not refer, intelligently, to any business transactions between the accused and the deceased. *Held*, prejudicial error. *Ibid.*

5. Evidence of threats made by third persons against the deceased was properly rejected, because, if offered to show motive for his leaving the country, it was irrelevant in the absence of evidence that he had knowledge of the threats; further, there was no controversy as to the real motive, and if offered to show that some other person than the accused was the guilty party, the evidence was irrelevant and hearsay. *Ibid.*

6. A refusal to instruct the jury on the subject of the certainty of the existence of the facts requisite to a conviction, *held* not reversible error, since the general charge contained full instructions on the subject. *Ibid.*

7. The giving of properly worded, specific explanatory instructions on the subject of reasonable doubt at the request of the attorneys for the accused, approved and advised; but a refusal to do so, when the

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general charge is full and plain on the subject so as to be understood, reasonably, by persons of ordinary comprehension, *held* not reversible error. *Ibid.*

8. The giving of special instructions on leading legal questions, as requested, or embodiment of them in the general charge, especially in an important case where such special instructions are more specific than the general charge, advised; but the refusal to do so when such general charge is sufficiently plain to be understood by persons of ordinary comprehension, *held* not error. *Ibid.*

9. Instructions so worded as to be difficult to understand, and so worded as to admit, reasonably, of a construction that would mislead the jury on a material point, *held* reversible error. *Ibid.*

10. A general order to strike out all the hearsay evidence admitted on a trial, made at the close of the trial, without specifying the particular evidence referred to, leaving it to the jury to determine what is and what is not hearsay evidence, *held* error. *Ibid.*

11. On a prosecution for murder where it was claimed that the killing was done in self-defense, the disparity in size of the parties was important only in determining what an ordinarily prudent man in the position of the accused would have done under all the circumstances; and where these considerations were fully submitted to the jury it was not a prejudicial error to refuse an instruction that "in the assault of a powerful man upon a weaker the necessity of taking life in self-defense will be more easily discoverable than in an attack by one man under equal circumstances." *Perugi v. State*, 230

12. A refusal to charge that the law does not require an assaulted party to call upon bystanders before resisting an attack was not error, where upon the evidence there was no necessity for such an instruction, and full instructions on the law of self-defense, covering every phase of the testimony, were given. *Ibid.*

13. The fact that just before the killing the deceased had "tried to grab" the accused while they were at a table in a saloon did not require the court to submit to the jury the question whether the killing was manslaughter in the second degree (Stats. 1898, sec. 4351), where all the circumstances and the accused's own testimony showed that the shooting was not done in resisting such assault. *Ibid.*

14. Where the evidence fails to show that there was any "heat of passion," the court need not submit the question whether the killing was manslaughter in the third or fourth degree. *Ibid.*

15. Where the evidence was undisputed that defendant shot the deceased, the bullet lodging in the spinal column and injuring it to such an extent that the wound was necessarily fatal, it was not error for the court to state that it appeared beyond question that defendant inflicted upon the deceased "a dangerous wound, from which death ensued eleven days thereafter," although the immediate cause of death was the shock resulting from an operation which was deemed advisable by the attending surgeons. *Ibid.*

16. Every homicide, not justifiable or excusable, perpetrated in pursuance of a previous intention to kill distinctly formed in the slayer's mind, is murder in the first degree, even though the killing follows instantly the formation of such intention. *Terrill v. State*, 95 Wis. 276, and *Sullivan v. State*, 100 Wis. 283, so far as they conflict with this doctrine, overruled. *Ibid.*

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17. An unconditional acceptance of the jury, after it is complete, by counsel for defendant in a criminal case is a waiver of all objections to the manner of its selection or to the qualifications of the jurors. *Cornell v. State*, 527

18. Duplicity in an information is not a ground for motion in arrest of judgment, at least unless the crimes be of distinct grades so as to affect the character of the sentence which may be imposed therefor. If the duplicity is apparent on the face of the information it must be taken advantage of by demurrer, or motion to quash, or motion that the prosecution be confined to one offense or the other; but if it is not so apparent the defendant's rights may be protected by motion to require an election when the duplicity is first made to appear to the court. *Ibid.*

19. An information charging the defendant with having killed and murdered two persons, naming them, does not show duplicity upon its face, since both may have been killed as the result of a single act. *Ibid.*

20. Where no particle of evidence was rendered either necessary or admissible by the fact that the killing of two persons was alleged in the information, the error, if any, in overruling a motion to require an election on the ground of duplicity is immaterial, and will be disregarded under sec. 2829, S. & B. Ann. Stats. *Ibid.*

21. Where a long hypothetical question is asked to which objection is made by the opposing party, it is the duty of counsel, both in the trial court and in the appellate court, to point out the particulars wherein the question is deemed improper. *Ibid.*

22. Where the evidence given is not conflicting and is not so complicated or voluminous as to make a difference of understanding of material facts probable, an expert witness who has heard it all may be asked to predicate his opinion thereon, on the assumption of its truth, without rehearsing it in a hypothetical question; but unless such conditions exist a question should be put embodying the facts on which the expert is asked to base his opinion. The volume and degree of complication of testimony, however, which renders one form of question or the other proper, rests largely in the sound discretion of the trial court. *Ibid.*

23. Where the accused was clearly guilty of wilful and premeditated murder unless he was insane and not guilty at all, a refusal to give intsructions relative to the lower grades of homicide was proper. *Ibid.*

24. Where the evidence is uncontradicted that before his arrest the defendant, after due reflection, sought and availed himself of an opportunity to make confessions of guilt, and was not led thereto by any invitation, request, threat, or promise, such confessions must be regarded as voluntary. *Ibid.*

25. In the prosecution of a father for the murder of his two children with whom he was sleeping, it appeared, among other things, that the accused was found in the room where the children were killed, with his throat cut; that the commission of the offense by any other person was improbable; and that the bottoms of the feet of the accused were stained with blood, showing conclusively that he had been on his feet after the killing. *Held*, sufficient corroboration of a confession of guilt to warrant a conviction, if such corroboration was required. *Ibid.*

26. The defendant in a criminal prosecution is not entitled to a list of the witnesses against him, there being no statute in this state conferring that right. *Ibid.*

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27. Error cannot be predicated on the refusal to allow the defendant to open and close the argument on the issue of insanity, unless proper exception is taken to the refusal. *Ibid.*

28. The admission, on the trial of the issue of insanity, of testimony *prima facie* connecting the accused with the offense charged is not error, where such testimony was relevant and admissible to show conduct bearing on his mental condition. *Ibid.*

CROSS-EXAMINATION. See CRIMINAL LAW, 3.

## DAMAGES.

See APPEAL, 17, 18. HIGHWAYS, 1, 2. HUSBAND AND WIFE, 2–5. INSTRUCTIONS TO JURY, 5. JUDGMENT, 3. PHYSICIANS AND SURGEONS, 1. RAILROADS, 10. REPLEVIN, 2–5.

1. In an action for personal injuries a charge that the jury, if they found for plaintiff, might award him such damages as the preponderance of the evidence showed he had sustained, if anything, by reason of injuries which were reasonably certain to prevent him from earning in the future, is *held* error, there being no evidence upon which to base it. *La Fave v. Superior,* 454

2. In an action for personal injuries caused by negligence it is not necessary to a recovery that the plaintiff's subsequent condition should be the "natural and probable" result of his injuries; it is sufficient if the damage claimed legitimately flows directly from the negligent act, whether it might have been foreseen by the wrongdoer or not. *Crouse v. C. & N. W. R. Co.* 473

3. In such a case it is error to permit an expert witness to give his opinion as to the necessity of medical attendance and the services of nurses for plaintiff in the future, and as to the extent to which such medical attendance would be required. DODGE and WINSLOW, JJ., dissent. *Ibid.*

4. Same point. *Selleck v. Janesville,* 570

5. Plaintiff's recovery not being excessive, the error in including future medical attendance and nursing as an element of damages may be cured, at plaintiff's option, by the remission from the verdict of such sum, fixed by the supreme court, as will leave it reasonably certain that no injustice is being done. *Crouse v. C. & N. W. R. Co.* 473

DEATH, Action for. See ESTATES OF DECEDENTS, 1.

DEBTOR AND CREDITOR. See CHATTEL MORTGAGES. GARNISHMENT. GUARANTY. SALE OF CHATTELS. VOLUNTARY ASSIGNMENT.

DECEIT. See SALE OF CHATTELS, 3.

DECLARATIONS. See INSURANCE, 4.

## DEEDS.

See EQUITY. MORTGAGES, 1–5. RELIGIOUS SOCIETIES, 1, 2. VENDOR AND PURCHASER, 9, 10.

A grantee of land who went into possession under a deed containing only a covenant for quiet possession and has remained in possession ever since cannot defend against a mortgage given by him to secure a part of the purchase price, or obtain a deduction from the amount due thereon, on the ground that the grantor did not have title to a part of the premises. *Falkner v. Woodard,* 608

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DEFICIENCY, Judgment for. See MORTGAGES, 6, 7.
DEFINITIONS. See WORDS AND PHRASES.
DEGREES of crime. See CRIMINAL LAW, 13, 14, 16, 23.
DELAY in bringing action. See MUNICIPAL CORPORATIONS, 2. TRUSTS, 5.
DELIVERY. See GUARANTY, 1.
DEMAND. See RAILROADS, 9. VENDOR AND PURCHASER, 9.
DEMURRER. See APPEAL, 2. PLEADING, 2.
DEPOSITIONS. See EVIDENCE, 12.
DEPOT GROUNDS. See RAILROADS, 19, 20.
DIRECTING VERDICT. See COURT AND JURY.
DISCRETION. See APPEAL, 10. PRACTICE, 1, 2. TOWNS, 1, 2.
DISMISSAL of appeal. See APPEAL, 7–9, 13. JUSTICES' COURTS, 1.
DUPLICITY. See CRIMINAL LAW, 18–20.

## DURESS.

See BILLS AND NOTES, 1, 2, 9.

1. Bringing an action for malicious prosecution and securing the defendant's arrest in bad faith and merely to coerce a settlement regardless of the fact whether a cause of action exists or not, is an abuse of process, even though the process be valid on its face; and a settlement so induced will be vitiated by the duress if that was reasonably adequate to overcome the will of the defendant and did overcome it. *Behl v. Schuett*, 76

2. The question being whether a note given by defendant to settle an action for malicious prosecution had been obtained by duress of imprisonment, the fact that bail had been fixed at an apparently excessive sum and had so remained was a fact properly to be considered by the jury, as having rendered successful duress easier of accomplishment, although such bail was fixed by a court commissioner and not by plaintiff. *Ibid.*

EJECTMENT. See JUDGMENT, 13. RAILROADS, 2.
ELECTION.
To treat contract as void. See VENDOR AND PURCHASER, 5, 6.
By widow, as to provision for her. See WILLS, 2, 7, 8.

## ELECTIONS.

1. Sec. 21, Stats. 1898 (which changed the law relating to the publication of general election notices by county clerks), controlled the publication of such notices only as were transmitted to the clerks after said statutes went into effect, September 1, 1898, even though the election was to be held after that date. *Endion Imp. Co. v. Evening Telegram Co.* 432

2. Sec. 21, Stats. 1898, requires the county clerk to publish as therein specified so much of the general election notice received by him from the secretary of state as relates to the questions and officers to be voted for in his county. Sec. 58 provides that when a proposed constitutional amendment or other question is to be submitted to the people, the secretary of state shall, not less than fifteen days before the election, certify the same to each county clerk, and the same shall be included in the publication of nominations for office provided for in sec. 36. *Held*, that the specific provision of

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sec. 58 governs and controls the more general provision of sec. 21, and should have been followed in the publication of notice of the submission of a proposed revision of the banking law, although a copy of such proposed revision was transmitted to the county clerk with the general election notice. *Ibid.*

3. Sec. 9, ch. 288, Laws of 1893, required the secretary of state to publish the general election notice in a newspaper at the seat of government once a week from the date thereof until the election. Sec. 10 required the county clerk to cause the substance of such notice "to be published in at least one newspaper in the county," but made no mention of the number of insertions, the former express provision for a weekly publication (sec. 18, R. S. 1878) having been superseded upon the adoption of the Australian ballot system. *Held*, that but one insertion of the notice required by sec. 10 was authorized. *Ibid.*

4. A county clerk has no authority to cause or contract for any publication of election notices except such as the law prescribes, and persons with whom he contracts for such publication are bound to take notice of said limitation. *Ibid.*

5. The fees for each publication of election notices being prescribed by law, the county board of supervisors has no power to compromise a claim for such publication, or to allow any sum in excess of the amount legally due. *Ibid.*

6. Where a daily newspaper accepts for publication the information to voters it is chargeable with notice that a daily publication is required by sec. 36, Stats. 1898, in counties wherein such a newspaper is published, and if it fails to comply therewith it is not entitled to any compensation. *Ibid.*

ELECTRIC RAILWAY: Condemnation of crossing. See RAILROADS, 4.

EMINENT DOMAIN. See RAILROADS, 1–4.

ENTIRE CONTRACT. See CONTRACTS, 1.

## EQUITY.

See APPEAL, 14. CORPORATIONS. COSTS. DEEDS. ESTOPPEL. GUARANTY. MORTGAGES. PARTIES, 5. PARTNERSHIP. PUBLIC LANDS. RAILROADS, 2, 3. TRUSTS. VENDOR AND PURCHASER. WATERS.

1. To warrant a court of equity in reforming a written instrument, the facts calling for it must be established by clear and satisfactory evidence and beyond all reasonable controversy. *Duecker v. Goeres*, 29

2. A purely voluntary conveyance of land by a father to an adult son, founded on natural love and affection and made, without any prior consultation or agreement with the grantee, as a testamentary disposition of property, will not, after the death of the grantor and as against his other heirs, be reformed so as to make it describe the land which the grantor intended, but by mistake failed, to convey. *Willey v. Hodge*, 81

3. By a deed reserving a life estate in the grantor, city lots were granted as follows: After his death, remainder to his daughter during her life, with power to distribute the same by will to her children living at her death and the children of her deceased children, and remainder in fee to such children and grandchildren in case of her failure to exercise the power; in case of the death of the daughter without leaving children or grandchildren, remainder to her mother

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for life, and remainder over, after death of the mother, in fee to the heirs at law of the grantor. Some time after the grantor's death the daughter brought suit to obtain authority to sell a part of the lots, including all estates therein, on the ground that such a sale was necessary in order to prevent a threatened destruction of such estates by tax and other liens thereon due to the improvident management of the plaintiff. Plaintiff's children (who were minors) were made parties; her mother had quitclaimed to her; and there were no other lineal descendants of the grantor, and no collateral heirs so far as known. *Held*, that the judgment of the court and its execution would act upon the whole title to the property, binding all persons having vested or contingent interests therein, present or future. *Ruggles v. Tyson*, 500

4. In such a case the court should intervene only for the purpose of preserving the property, and should disturb the scheme of the grantor only so far as may be necessary for that purpose. Its judgment should not go beyond providing for a sale of a part of the property to create a fund out of which to guard against the dangers menacing the title in remainder, and for such investment of the residue of the fund and such disposition of the property unsold as will prevent a recurrence of such dangers and as far as practicable remedy the impairment of the estate caused by the improvident management of the life tenant. *Ibid.*

5. The necessities of the children will not justify, in such a case, a disturbance of the scheme of the grantor, because their interests in the estate may never ripen into an absolute title or property which they will be entitled to enjoy. In no way, even if such children were of full age and the life tenant should surrender her power of appointment under the deed, could the parties, without the aid of the court, sell the property absolutely so as to cut off the rights of those contingently interested therein. *Ibid.*

6. Whatever the necessities of the parties may be, the court cannot break in upon the estate in remainder to relieve them, and cannot sever the life estate from the residue of the title unless it appears that there is no other practical way to administer the property under the circumstances. *Ibid.*

7. The jurisdiction of the court in such a case to grant relief by providing for the preservation of the property is not limited to the adoption of the specific methods of relief prayed for in the complaint, even in the absence of a general prayer for relief; nor is the power of the court in respect to the subject of the action limited by any particular object which may have been in view in its institution. *Ibid.*

8. The property involved in such action is the whole property constituting the estate, not merely that part which plaintiff asks to have sold, and the subject of the action is the preservation of the entire estate for those entitled to it under the scheme of the grantor. *Ibid.*

9. On a general appeal from the judgment of the trial court in such a case the appellate court is not confined to an examination of the errors assigned, but may examine and correct the judgment in every respect where legal principles have been violated to the prejudice of the appellants or those whom they represent, so far as such violations clearly appear from the record. *Ibid.*

ESTATES in land. See EQUITY, 8-9. PARTIES, 5. WILLS, 4.

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## ESTATES OF DECEDENTS.

See APPEAL, 14, 21. WILLS.

1. The right of action under secs. 4255, 4256, Stats. 1898 (providing that where the death of a person is caused by the negligence of another the wrongdoer may be held liable in an action brought in the name of the personal representatives of the deceased, and the amount recovered shall "belong and be paid over to his . . . lineal descendants"), constitutes no part of the estate of the deceased, and is not taken away by the failure or refusal of the administrator to commence suit before final settlement. *Hubbard v. C. & N. W. R. Co.* 160

2. The appointment of an administrator *de bonis non* of an intestate estate without any notice being given as required by sec. 3808, Stats. 1898, and without the appointment of a guardian *ad litem* for minor heirs, is invalid even though the application for the appointment of such administrator was made by the general guardian of such minors. *Ibid.*

3. An order of the county court, made more than sixteen months after the appointment of such administrator, allowing a guardian *ad litem* to file an appearance on behalf of the minors *nunc pro tunc* as of the date of such appointment did not validate the appointment. *Ibid.*

4. The functions of a guardian *ad litem* appointed to represent infants in the general administration of an estate in the county court terminate with the final settlement of the estate, unless continued by order of the county court. *Ibid.*

5. Prior to the enactment of ch. 335, Laws of 1897, county courts had no power, by the taking of a new bond or otherwise, to discharge sureties on the bond of an executor or administrator from liability for either past or prospective misconduct of an executor, administrator, or trustee; but such new bond, if taken, was merely cumulative. *Rudolf v. Malone,* 470

6. The sureties on the second or cumulative bond of an executor, which was signed by five of the sureties on the first bond and three other persons, may enforce contribution from sureties on the first bond who did not sign the second, to recover the latter's share of an amount paid by the plaintiffs by reason of embezzlement by the principal prior to the execution of the second bond; and recitals in the second bond that one of the signers of the first desired to be released and another had removed from the county do not operate as an estoppel against the plaintiffs, nor do they show an agreement between the parties that the sureties on the second bond were to be primarily liable. *Ibid.*

## ESTOPPEL.

See BILLS AND NOTES, 8. ESTATES OF DECEDENTS, 6. TAXATION, 4.

The state is not bound or estopped by a construction placed by a state officer upon a contract made under legislative authority, where he is not authorized to act for the state in that particular respect. *Grunert v. Spalding,* 193.

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## EVIDENCE.

See BOUNDARIES. CRIMINAL LAW, 1–5, 10, 21, 22, 24–26, 28. DURESS, 2. HIGHWAYS, 2, 3, 6. INSURANCE, 4–6. MUNICIPAL CORPORATIONS, 8, 9. PHYSICIANS AND SURGEONS, 2. RELIGIOUS SOCIETIES, 3. SALE OF CHATTELS, 3. SIGNATURES, 2. WILLS, 1, 5, 6.

1. Unless a witness is a party to the action, or is in fact the real party in interest, or is a person through or under whom the party offering his testimony derives his interest or title, secs. 4069, 4070, Stats. 1898, do not make him incompetent to testify as to transactions had by him personally with a person since deceased, through whom the opposite party claims. *Laack v. Runge*, 59

2. In an action upon an alleged agreement by a father to pay an adult daughter $1,000 if she would stay at home and work until her brother married, it was a material error to permit the plaintiff to testify to the effect that three years before the making of the contract sued on her father promised her $1,000 or men's wages if she would stay and work, and that she worked three years without pay on the strength of such promise. *Koehler v. Koehler*, 260

3. In an action on an oral contract made in German, it was not error to refuse to permit a witness who had testified to the terms of the contract to state in German what the defendant said, where there was no claim that any German words of doubtful meaning or capable of two constructions were or might have been used, and it did not appear that any one was present at the trial capable of translating the German words to be elicited. *Ibid.*

4. Opinion evidence is the most unsatisfactory kind of evidence that can be produced, and falls to the ground as worthless and insufficient to support a verdict when inconsistent with undisputed facts or reason and common sense applied to other credible evidence. *Baxter v. C. & N. W. R. Co.* 307

5. Practical experience of a person, sufficient to fairly show that he is possessed of more than ordinary knowledge in regard to a proper subject of opinion evidence, sufficiently shows competency of such person to give such evidence. *Ibid.*

6. The opinion of a witness in regard to the limits of safe boiler pressure, based on a hypothetical question assuming the existence of a material defect not testified to, is error, but not prejudicial where the subject of inquiry is the cause of the explosion of a boiler causing a personal injury, except as bearing on the measure of damages, where the cause of such explosion conclusively appears by other evidence. *Ibid.*

7. The test of whether defendant was guilty of a want of ordinary care in caring for its locomotive boilers, was whether its conduct came up to the customary care exercised by corporations generally in the same line of business, and evidence of an expert as to what care should be exercised to discover defects in such boilers, independent of such general custom, was not relevant except in regard to whether such custom was obviously insufficient; but such evidence was not prejudicial since it accorded with the customary way of inspecting boilers as shown by the evidence. *Ibid.*

8. The claim being that a boiler which exploded and caused the injuries complained of, including the flues thereof, was in a generally worn-out condition, and that because of such condition as to the shell the explosion took place, evidence of the condition of the flues, as well as other parts of the inside structure of the boiler, was

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proper on the question of knowledge or reasonable means of knowledge on the part of the defendant of the existence of defects in the shell. *Ibid.*

9. A plaintiff being in court and no reason appearing why the jury cannot have a view of his injured leg, which is a subject of inquiry, the exhibition of a photographic representation of it and permission to the jury to take such photograph to their room is not prejudicial error if the witnesses on both sides describe the condition of the leg substantially as shown by the photograph, and no request is made that they be allowed to see the original. *Ibid.*

10. Photographic representations are not proper where the original can be readily exhibited to the jury, unless used to aid in identifying some writing or detecting a forgery. *Ibid.*

11. Where photographs are not substantially necessary or instructive to show material facts or conditions, and they are of such a character as to arouse sympathy or indignation, or to direct the minds of the jurors to improper or irrelevant considerations, they should be excluded. *Selleck v. Janesville,* 570

12. The party at whose instance the examination of an adverse party was had may introduce in evidence portions of it relating to a particular subject, and the other party will then have the right to read additional portions as explanatory thereof; but the exclusion of portions of the deposition on the ground that none of it can be received unless all is offered will not warrant a reversal, where the record fails to show a sufficiently definite offer and it is not clear that the party making the offer suffered any injury from being compelled to introduce the entire deposition. *Wunderlich v. Palatine F. Ins. Co.* 382

13. In an action for personal injuries it is error to permit a medical expert to testify that the injured person will require medical attendance in the future, and to estimate the number of visits weekly that will probably be required. *Crouse v. C. & N. W. R. Co.* 473; and *Selleck v. Janesville,* 570

14. Sec. 4096, Stats. 1898, prohibiting the testimony of a party "in respect to any transaction or communication by him personally with a deceased person," does not forbid testimony of transactions or communications between the deceased and third persons, though in the witness's presence, if he did not participate therein and they were not affected by his presence. *Wollman v. Ruehle,* 603

15. In an action to recover the price of several hundred loads of crushed stone, the fact that there was a shortage in three loads which were reweighed is insufficient to establish a shortage in any other load. *Hoffman v. Maffioli,* 630

EXAMINATION of adverse party. See EVIDENCE, 12.

EXCEPTIONS. See APPEAL, 10.

EXCESSIVE DAMAGES. See APPEAL, 17, 18. DAMAGES, 5.

EXECUTION. See LOGS AND LUMBER, 3.

EXECUTORS AND ADMINISTRATORS. See APPEAL, 14, 21. ESTATES OF DECEDENTS. WILLS.

EXEMPLARY DAMAGES. See INSTRUCTIONS TO JURY, 5. REPLEVIN, 4.

EXEMPTION from taxation. See TAXATION.

EXHIBITS. See PRACTICE, 2.

EXPERT TESTIMONY. See CRIMINAL LAW, 21, 22. DAMAGES, 8. EVIDENCE, 4–7, 13. HIGHWAYS, 2. NEGLIGENCE, 3.



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FALSE REPRESENTATIONS. See SALE OF CHATTELS, 3.
FEDERAL COURTS. See RAILROADS, 3.
FEES for publishing election notices. See ELECTIONS, 5, 6.
FENCES. See ADVERSE POSSESSION. BOUNDARIES. RAILROADS, 19–21.
FILING of notice of appeal. See APPEAL, 5.
FIRE INSURANCE. See INSURANCE, 7–13.

## FIXTURES.

A dynamo, exciter, and belts were placed in the building of an electric light company under an agreement to pay rent therefor, with an option to apply the rent on the purchase price of a larger dynamo or to purchase the one so put in and apply the rent thereon. At the expiration of the option the company purchased the machinery so put in, intending, however, to purchase a larger dynamo thereafter. The dynamo weighed three and one-half tons, and was fastened to timbers in the building by means of lag screws, and was moved from time to time. The other machinery was fastened to timbers in substantially the same way. The outfit was of more than sufficient capacity to supply all the light the company had contracted to furnish, and was in operation at the time of a foreclosure sale under a mortgage given to procure funds to construct the plant. *Held* that, as between the purchaser at such sale and the original vendor of the machinery, the machines had become fixtures. *Gunderson v. Swarthout*, 186

FLAGMAN: Failure to give warning. See RAILROADS, 23, 24.
FORECLOSURE. See MORTGAGES, 6, 7.
FOREIGN LANGUAGE. See EVIDENCE, 3.
FORMER ADJUDICATION. See JUDGMENT, 5–13.
FRAUD. See BILLS AND NOTES, 8. CHATTEL MORTGAGES. CORPORATIONS, 3. SALE OF CHATTELS. VOLUNTARY ASSIGNMENT. WILLS, 6.
FRAUDULENT CONVEYANCES. See CHATTEL MORTGAGES. VOLUNTARY ASSIGNMENT.

## GARNISHMENT.

1. Upon a compromise of the differences between S. and H., some of which were in suit, a sum of money was, pursuant to a stipulation, deposited by H. with his attorneys to be by them paid to S.'s attorney, E., upon compliance by E. with certain conditions, one of which was the satisfaction of a real-estate mortgage held by plaintiff herein against S. After all the conditions had been complied with, but before the money had been paid over to E., the plaintiff garnished H.'s attorneys for the purpose of subjecting the money to the payment of a claim against S. The garnishees paid the money into court, and E., being interpleaded as defendant, claimed the money as his own by virtue of an attorney's lien thereon for services and expenses and by virtue of an assignment from S. It appeared that the value of E.'s services, together with his disbursements and the amount advanced by him for the satisfaction of the mortgage mentioned, exceeded the sum in question. *Held*, that the money was not subject to garnishment as the property of S., and that the trial court properly ordered it to be paid over to E. *Southwestern Land Co. v. Ellis*, 445

2. The plaintiff could not, in such garnishment proceedings, litigate a claim against E. for false representations in procuring the satisfac-

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tion of the mortgage, or a claim for damages for breach of contract in performing services for it in the suit of S. against H.; nor could it question E.'s right to the money in the garnishees' hands on the ground that it belonged to his assignee for the benefit of creditors. *Ibid.*

3. A written assignment from S. to E. of the proceeds of the litigation and settlement between S. and H. did not confer upon E. any rights in addition to those secured under the stipulation, but was merely an acknowledgment of those rights; and it is immaterial, therefore, that such assignment was not executed until after the garnishment. *Ibid.*

GOVERNOR. See TAXATION, 4.

## GUARANTY.

See JUDGMENT, 3. MORTGAGES, 6.

1. Where a guaranty of payment for goods to be sold on credit was delivered by the guarantor to the proposed debtor with the understanding that until it had been signed by another guarantor it was not to be delivered to the guarantee, and the guarantee, to whom the instrument was delivered in violation of said understanding, had knowledge of the facts before extending credit, he cannot hold the guarantor liable, unless the latter has been guilty of some act amounting to an estoppel. *New Home S. M. Co. v. Simon*, 120

2. Evidence of such an understanding between the guarantor and proposed debtor is admissible as against the guarantee although he was not present at the time, if he afterwards had notice of the fact before extending credit. *Ibid.*

3. Negotiations between the guarantee and the proposed debtor in regard to limiting the liability of the guarantor to a smaller sum than that stated in the guaranty, which were finally relinquished, and the original contract adhered to, and notice of its acceptance thereafter duly given, did not release the guarantor from liability. *Ibid.*

GUARDIAN AND WARD. See BILLS AND NOTES, 3. ESTATES OF DECEDENTS, 2–4. TRUSTS.

HEARSAY EVIDENCE. See CRIMINAL LAW, 5, 10. INSURANCE, 6.

## HIGHWAYS.

See MUNICIPAL CORPORATIONS. RAILROADS, 23–25.

1. Under sec. 824, Stats. 1898 (providing that "no action upon any claim or cause of action for which a money judgment only is demandable . . . shall be maintained against any town unless a statement or bill of such claim shall have been filed with the town clerk to be laid before the town board of audit"), the damages recoverable in an action against a town for personal injuries are limited to the amount named in the claim filed. *Conrad v. Ellington*, 367

2. In an action to recover for injuries alleged to have been caused by defects in a corduroy road, evidence of a medical expert that such an accident as plaintiff claimed to have suffered *might* produce such an injury as that received by him, and that plaintiff's injuries incapacitated him to the extent of about two thirds, although somewhat conjectural, is *held* not to constitute material error. *Ibid.*

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3. It was not error in such a case to permit proof of the generally bad condition of the corduroy road at and in the vicinity of the place in question two days before the accident. *Olson v. Luck*, 103 Wis. 33, distinguished. *Ibid.*

4. In an action to recover for personal injuries, remarks of the trial judge to the effect that he did not think there was any negligence in the conduct of plaintiff up to the time the doctor was called in, that the doctor got to his home at about the same time he did, and that negligence could not be predicated on that as a matter of law,—such remarks referring merely to the matter of promptly calling a physician, and there being no dispute as to that fact,—are *held* not error. *Ibid.*

5. In an action for injuries alleged to have been caused by a defect in a highway, defendant claimed that such defect was caused by a sudden and heavy rainfall the night before the accident. One of the questions in the special verdict was, "Was such defective condition of the highway the proximate cause of the plaintiff's injury?" In submitting this question the court instructed the jury as to the meaning of "proximate cause," but did not specifically require them to find whether the condition of the highway prior to said rainfall was the proximate cause of the injury. *Held*, not misleading, in view of other full instructions on that subject. *Ibid.*

6. The burden of showing contributory negligence in such a case is upon the defendant, except when such negligence is disclosed by the testimony on the part of the plaintiff. *Ibid.*

7. The question of plaintiff's contributory negligence is *held* to have been properly submitted to the jury, notwithstanding the sudden and heavy rainfall the night before the accident. *Ibid.*

HOMESTEADS. See MORTGAGES, 5. VENDOR AND PURCHASER, 3. WILLS, 2, 3.

## HUSBAND AND WIFE.

See JUDGMENT, 12. MORTGAGES, 5.

1. In purchasing family supplies a wife acts as agent of her husband, and her election to rescind a contract for the purchase of meat and receive back the consideration because the meat was bad does not affect her right to damages in a tort action for her sickness caused by eating some of the meat. *Haberman v. Gasser*, 98

2. The "services" of the wife, for the loss of which the husband may recover, are not only such services as a hired domestic servant might perform, but also wifely services, such as are due from her, and include the idea of her society; and the measure of recovery is the value to him of such services, not merely their market value. *Keller v. Gilman*, 93 Wis. 9, distinguished. *Selleck v. Janesville*, 570

3. Of a wife bedridden or compelled to move on crutches, suffering severe pain, and with shattered nerves, as the result of injuries, it cannot be said to conclusively appear that her ability is not impaired to render services and assistance, other than physical, to her husband, which would otherwise have been within her power. *Ibid.*

4. A husband who used reasonable care in the employment of physicians to treat his wife for personal injuries is not responsible for their failure to exercise the highest skill and adopt the best means to effect a cure. *Ibid.*

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5. The husband may recover the value of his own services in necessary attendance upon his wife by reason of her injuries, but his recovery in that regard should be limited to the amount for which he could have hired reasonably competent attendance by others. *Ibid.*

HYPOTHETICAL QUESTIONS. See CRIMINAL LAW, 21, 22.

INCONSISTENCY in special verdict. See INSURANCE, 7.

INDEMNITY. See CORPORATIONS, 2.

INFANTS. See EQUITY, 3–6. ESTATES OF DECEDENTS, 2–4. MASTER AND SERVANT, 1. TRUSTS.

## INJUNCTION.

See RAILROADS, 2, 3. WATERS, 1, 3.

If, in an action to restrain the sale of lands for taxes alleged to be void, all the equities of the complaint are denied under oath, a refusal to restrain the sale *pendente lite* is not an abuse of discretion, where there will be ample time to bring the controversy to a final conclusion before plaintiff's title can be disturbed or injuriously clouded by a tax deed, and the filing of a *lis pendens* will fully protect his rights. *Chicago & N. W. R. Co. v. Langlade County,* 373

INSANITY. See CRIMINAL LAW, 27, 28.

INSOLVENCY. See SALE OF CHATTELS. VOLUNTARY ASSIGNMENT.

## INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 6–9, 11–15, 23. HIGHWAYS, 4, 5. MUNICIPAL CORPORATIONS, 7. NEGLIGENCE, 1, 2.

1. A charge stating fairly the claims of the respective parties in accordance with the evidence is *held* not to have been erroneous as likely to mislead the jury into supposing it to be a statement of facts proven. *Behl v. Schuett,* 76
2. The refusal to give special instructions as requested is not error where, so far as they were material and correct, they were fairly covered by the general charge. *Ibid.*
3. Same point. *Haberman v. Gasser,* 98
4. In an action for the injury caused by eating diseased meat sold by defendant to plaintiff, a charge that it was an offense, under the statute, knowingly to sell unwholesome meat, is criticised but *held* not a material error, the court not having been requested to call the jury's attention to the fact that the action was not a criminal one, and the verdict not giving evidence of the influence of passion or prejudice. *Ibid.*
5. In an action in which the question whether exemplary damages ought to be awarded was one for the jury under proper instructions, a charge stating, among other things, that it was the privilege of the jury "in this case" to award such damages.— from which the jury must have understood that, as matter of law, the particular case was one calling for the imposition of exemplary damages in their discretion,— is *held* erroneous. *Ibid.*
6. Where a special verdict is to be rendered, the court should not give general instructions on the law of the case, from which the jury can readily tell the effect of their answers, but should give only such instructions on the law as will enable the jury to make intel-

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ligent answers to the questions propounded. *New Home S. M. Co. v. Simon,* 120

7. Where a cause is submitted for a special verdict, such instructions should be given respecting each question as to enable the jury to answer it intelligently, and a refusal to do so, by the rejection of specific requests to that end, is error, if the subject matter of such requests be not otherwise covered by proper instructions; but instructions regarding the effect of an answer, or the answers as a whole, should not be given. *Baxter v. C. & N. W. R. Co.* 307

8. It is the better practice in submitting questions to a jury to confine the instructions to such a statement of the law as to each question as is called for by the evidence and necessary to enable the jury to answer it intelligently. The contrary course is *held* to have led, in this case, to advisory findings by the jury (which the court adopted) upon probabilities suggested in the charge but not arising from the evidence. *Fox v. Martin,* 581

9. In an action to recover for dental services, in which the answer alleged that the services were so unskilfully and negligently performed as to be worthless, and also set up a counterclaim for damages by reason of such unskilful work, the trial court, in charging the jury as to the burden of proof on the question whether the work was or was not skilfully done, made inconsistent statements which failed properly to distinguish between the two issues presented and must have confused the jury. *Held,* a material error. *Harrington v. Priest,* 862

## INSURANCE.

*Life insurance: Mutual benefit societies.*

1. One who is insured in a mutual benefit association and who wishes to change the beneficiary must make the change in the manner required by his policy and the rules of the association, and any material deviation from that course will render the attempted change ineffective; but where the insured, having done every substantial act required of him, dies before the new certificate is actually issued, and only formal acts on the part of the association remain to be performed, the change will be considered to have been made, even in an action at law. *McGowan v. Supreme Court I. O. F.* 173

2. Answers of the insured, in his application for insurance, to questions concerning the health, death, or age at death of his ancestors and brothers and sisters, are material as a matter of law, and it is error to submit the question of their materiality to the jury, even though by the policy such answers are made the basis of the contract and declared to be warranties only so far as they are material. *Ibid.*

3. In such a case, the insured in answer to the question for what disease he had been attended by a physician during the last five years, replied that he did not need any. He also declared at the close of his application that his answers were "true and correct," and that he had made no "intentional omission, concealment, or mental reservation of any material fact or circumstance relating to his past or present health, habits, or condition, or family history." There was evidence that he had a chronic cough and weakness of the lungs for two or three years before the application. *Held,* that the questions whether the insured had had a disease for which he needed the services of a physician during the time mentioned, and whether his answer that he had not needed any physician was not an intentional omission or concealment of a material fact as to his health, should have been submitted to the jury. *Ibid.*

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4. Declarations and admissions of the insured, made prior to the application, and so remote as to be disconnected with any act or fact showing his then condition of health, are incompetent as substantive proof to contradict the statements made in the application, as against a third party who is the beneficiary; but where there is independent evidence of the falsity of those statements, evidence of the prior declarations is admissible to show that the assured knew that the statements were false. *Ibid.*

5. Where the examining physician of a fraternal insurance company is an officer of the local lodge, his report as to the physical condition of an applicant for insurance, made after a personal examination, is a statement of an officer of the insurer, made as a part and within the scope of his official duties, and as such is admissible in evidence as an admission of the insurer, under the same conditions as admissions of agents generally. *Hiles v. Hanover F. Ins. Co.* 65 Wis. 585, distinguished. *Ibid.*

6. *It would seem* that the testimony of a physician that during the year preceding the issuance of a policy of insurance he was consulted by the insured as a physician and treated him for a disease, is inadmissible, since it must have been based either upon a privileged communication or upon hearsay. *Ibid.*

*Fire insurance.*

7. In an action upon fire insurance policies a special verdict finding that plaintiffs had not made any false entries in their books or false statements in their proofs of loss, etc., but finding that the amount of property destroyed was much less than the amount claimed in such proofs and shown by the books, is *held* to be inconsistent and contrary to the great weight of evidence and against all reasonable probabilities in the case. *Wunderlich v. Palatine Fire Ins. Co.* 382

8. *It would seem* that a policy of fire insurance covering lumber owned by the insured "or held in trust or on commission, or sold but not delivered, piled in their mill yard," is not an "open policy" such as would authorize the owner of any such lumber, in case of loss, to sue directly for the insurance on his property. *Wunderlich v. Palatine Fire Ins. Co.* 395

9. Where the insured property in such case was covered by an executory contract of sale but none of it, at the time of its destruction, had been so separated or delivered as to vest any title in the vendee, the vendors' right of recovery on the policy was complete without the "sold and not delivered" clause, and was not affected by it unless they were thereby absolved from some disclosure as to the sale otherwise required under the policy; and the vendee had no interest in the lumber which would give it a right of action against the insurer, even construing the policy as an open one. *Ibid.*

10. A provision in a policy of insurance that the loss shall be payable to a third person as his interest may appear does not give such person an independent right of action against the insurer, but the question whether he has any, and if so what, interest in the insurance money by virtue thereof is entirely between him and the insured, and bears merely on the distribution of such sum as the latter may ultimately recover. *Ibid.*

11. The vendors of a portion of the lumber in a mill yard under an executory contract requiring them to keep the lumber insured, with policies to be assigned to the vendee as its interest might appear, took out policies in their own names, in some of which the loss was

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made payable as provided in the contract, but in all of which their relation to the companies was the same as to all lumber in their yard, without distinguishing or differentiating that covered by the contract. *Held*, that the vendors did not act as agents of the vendee in effecting the insurance. *Ibid.*

12. The clause in such contract requiring the vendors to insure the lumber with policies assigned to the vendee as its interest might appear was intended to secure the vendee to the extent of the advances which it might make upon the lumber while it remained in the possession of the vendors, and not against the loss of profits which would be occasioned by the destruction of the property. *Ibid.*

13. The implication of a condition in the contract for the sale of the lumber that delivery should be excused in the event of its destruction is *held* not to be excluded by the agreement to keep it insured with policies assigned to the vendee as its interest might appear,—such agreement not being equivalent to an agreement by the vendors themselves to insure the property or its existence. *Ibid.*

INTENT not to pay. See SALE OF CHATTELS, 1, 3.

INTOXICATION. See MUNICIPAL CORPORATIONS, 7.

JOINT or several liability. See PARTIES, 4. TOWNS, 4.

## JUDGMENT.

*For relief obtainable in another proceeding.* See APPEAL, 14.

*Of affirmance, on motion to quash.* See CERTIORARI, 3–6.

*In equity, to avoid circuity.* See CORPORATIONS, 9.

*For part of relief demanded.* See COSTS.

*For relief not prayed for.* See EQUITY, 7.

*Dismissing appeal for lack of jurisdiction.* See JUSTICES' COURTS, 1.

*Personal judgment.* See MORTGAGES, 6, 7.

*For deficiency, on foreclosure.* See MORTGAGES, 6, 7.

*Transcript of justice's judgment: Filing, etc.*

1. The transcript of a justice's judgment filed in the office of the clerk of the circuit court of the county where it was rendered, pursuant to sec. 2900, Stats. 1898, for the purpose of giving such judgment the status of a circuit court judgment till ten years from the date of its rendition, pursuant to sec. 2902, is a nullity unless the statutes in relation to such transcript and the filing thereof are followed in every material particular. *Duecker v. Goeres*, 29

2. The provisions of sec. 3669, Stats. 1898, relating to the form of transcripts of justice's judgments, and sec. 2902, limiting the life of a transcripted judgment, make the date of the rendition of the judgment in justice's court a material part of such transcript. *Ibid.*

3. A transcript of a judgment which did not show the date of its rendition was filed in the office of the clerk of the circuit court of the proper county, and more than six years after such rendition the owner assigned such judgment to another, guaranteeing that it was a legal judgment, and secured such guaranty by a mortgage on real estate. *Held:*

(1) The filing of the transcript was a nullity.

(2) The judgment was extinguished by the six-year limitation upon the enforcement of a justice's court judgment.

(3) The condition of the mortgage was breached when made, ren-

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dering the mortgagor liable for such damages as must reasonably have been in the contemplation of the parties at the time of the making of the guaranty as the probable result of such a breach.

(4) The proper measure of damages in the circumstances stated is the full consideration paid for the judgment, with interest. *Ibid.*

*Collateral attack.*

4. A lack of jurisdiction affirmatively appearing from the record may be taken advantage of upon collateral attack upon a judgment. *O'Malley v. Fricke,* 280

*As to land: Conclusiveness: Parties: Future estates.* See EQUITY, 3.

*Res adjudicata: Parties and privies.*

5. In a subsequent litigation between the same parties or their privies, though upon a different cause of action, the conclusiveness of a prior judgment as to an issue actually decided thereby cannot be avoided by a mere new argument which, though not then urged, was necessarily, in effect, overruled by the previous decision, nor by new or different evidence upon the same question. *Grunert v. Spalding,* 193

6. In a subsequent litigation between the same parties or their privies on a different cause of action, a prior judgment is conclusive only as to those issues which affirmatively appear to have been in fact adjudicated. *Ibid.*

7. The mere personal effect of a judgment is absolutely confined to the parties to the litigation, and does not attach to or become a rule of property as to any other thing than the particular subject of the controversy which was closed by the judgment. *Ibid.*

8. It is only when the particular property or right which has been transferred is affirmatively shown to have been the subject matter of the former adjudication, and its status settled thereby, that the effect of that litigation is conclusive upon a grantee or transferee of property. *Ibid.*

9. One Nelson obtained possession of property from plaintiffs by inducing them by false representations to sell the same to him. Part of such property Nelson thereafter sold to innocent third persons, and the balance was taken on an execution issued to enforce a judgment against him. Subsequently, plaintiffs rescinded the sale for fraud and commenced this action against the officer to recover possession of the property held by him, and a second action against Nelson for damages in respect to the property that could not be recovered by reason of its having been sold by him to innocent third persons. The action for damages proceeded to judgment. Such judgment was offered in evidence on the trial in this action as binding upon the defendant, on the ground that he could claim no better right than Nelson. The evidence, on objection, was ruled out. *Held,* that the ruling was proper, first, because if defendant obtained any interest in the property in controversy it vested in him before the commencement of the action against Nelson; and second, because the property in controversy in this action is not the same property in controversy in the action against Nelson. *Hart v. Moulton,* 349

10. The doctrine of *res adjudicata* extends to and binds privies of the parties to the litigation as well as the parties themselves, but privity, under such rule, exists only in relation to the subject matter of such litigation. The decision in an action becomes a rule of property as to the subject matter thereof and passes with it to all

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persons subsequently claiming under such parties, but does not attach to any other property, the limit of its effect as to privies being the limit of the particular property, property right, subject matter, or thing involved in the litigation. *Ibid.*

11. The evidence on a second trial being substantially the same as on the first, and the same special verdict having been rendered, it is *held*, on appeal from the second judgment, that a decision on the appeal from the first judgment, to the effect that the special verdict covered all the material issues and that the refusal to submit other questions and to give certain instructions was not error, is *res adjudicata*. *Crouse v. C. & N. W. R. Co.* 473

12. In an action to recover damages resulting to a husband from personal injuries to his wife, defendant's liability is not rendered *res judicata* by reason of a previous recovery by the wife for her own injuries, the husband not being a party to the former action and there being no privity between him and his wife as to the claim in the latter suit. *Selleck v. Janesville*, 570

13. On appeal from the judgment rendered on the second trial of an action of ejectment, the decision of the supreme court on appeal from the first judgment is *res adjudicata* only so far as substantially the same case is presented. *Wollman v. Ruehle*, 603

*Reversal on appeal.* See APPEAL, 14–18.

JUDGMENT ROLL. See APPEAL, 7.

JUDICIAL NOTICE. See RELIGIOUS SOCIETIES, 3.

JURISDICTION. See APPEAL, 7–9. CERTIORARI. EQUITY, 3–9. JUSTICES' COURTS. PARTIES, 5. REPLEVIN, 1. SERVICE OF SUMMONS. TRUSTS, 4.

JURORS. See CRIMINAL LAW, 17.

## JUSTICES' COURTS.

See APPEAL, 8. JUDGMENT, 1–3.

1. Where a court is without jurisdiction of an appeal from justice's court its province is limited to a mere order of dismissal and for the payment of costs, yet if the determination be in form a judgment the irregularity is not prejudicial. *Finlay v. Prescott*, 614

2. The fact that the marks made for signatures of the appellant to the affidavit and notice of an appeal from justice's court are not witnessed does not affect the sufficiency of the appeal papers. *Ibid.*

LACHES. See MUNICIPAL CORPORATIONS, 2. TRUSTS, 5.

LAKES. See WATERS, 3, 4.

LAND CONTRACT. See VENDOR AND PURCHASER, 4–9.

LAND GRANTS. See TAXATION, 3, 4.

LEAVE OF COURT. See RAILROADS, 3.

## LIBEL AND SLANDER.

1. An allegation in a complaint for slander that a word, ordinarily not slanderous, is commonly understood at the place where it was spoken as charging a crime, is merely an allegation that the word is there ambiguous and *may* have the criminal meaning; and the question whether it is capable of such meaning in the light of the whole context is for the court, whether presented upon demurrer or by proof on the trial. *Robertson v. Edelstein*, 440

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2. The words, "Get out of here, you son of a bitch. I know you are nothing but a damned old bitch," spoken of a married woman, cannot reasonably be construed as charging that she was a common whore or prostitute and was guilty of the crime of adultery, even though the word "bitch" was commonly understood to mean that, at the place where the words were spoken. *Ibid.*

LIENS. See LOGS AND LUMBER, 3. VENDOR AND PURCHASER, 1-3.

LIMITATION OF ACTIONS. See ADVERSE POSSESSION. CORPORATIONS, 8. MORTGAGES, 6. MUNICIPAL CORPORATIONS, 1, 2. TRUSTS, 5. VENDOR AND PURCHASER, 6.

## LOGS AND LUMBER.

1. The only issue being as to which of two rules for scaling logs was to have been used under an oral contract of sale, and there being no impeachment of the fairness of the scale made, it was error to submit to the jury the question of the accuracy or correctness of that scale. *Baldwin v. Cornelius,* 68

2. If, in such a case, it had been agreed that the logs should be scaled according to the rule contained in a certain book possessed by one of the parties, and they were so scaled, it was immaterial whether said party had read the rule and knew its terms, or what his belief was as to the rule contained in the book,—no question of mistake or deceit being involved. *Ibid.*

3. *It would seem* that, in cases coming squarely within the provisions of ch. 378, Laws of 1889 (relating to levy upon marked logs), the levy must be made in conformity with that act. *Butler v. Gillis,* 421

MAILING of summons. See SERVICE OF SUMMONS.

MALICIOUS PROSECUTION. See DURESS.

MALPRACTICE. See PHYSICIANS AND SURGEONS.

MANDAMUS. See RAILROADS, 4.

MANSLAUGHTER. See CRIMINAL LAW, 13, 14.

MARK, Signature by. See JUSTICES' COURTS, 2. SIGNATURES.

## MASTER AND SERVANT.

See RAILROADS, 26-29.

1. Plaintiff, a boy about seventeen years old, had worked for two seasons in defendant's brick yard, and during that time, for a day or two at least, had operated the cars on a small railroad used to haul clay out of the clay pit, which were drawn by a wire rope winding around a drum operated by an engine. These cars could be stopped by the brake and by signal to the engineer. At the time of the accident plaintiff was operating a car, and was standing on its front platform by the brake as it was drawn up the incline from the pit. The rope in some manner caught under the end of one of the boards which formed a walk between the rails, raising such board so that, as the car advanced, it struck and broke plaintiff's leg. Plaintiff was riding with his back to the rope, although he knew of the dangers to be anticipated therefrom and had on this very trip been cautioned to turn around and look at the rope. *Held,* that he was guilty of contributory negligence. *Youngbluth v. Stephens,* 343

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2. Plaintiff, an unskilled laborer about a planing mill, was injured while temporarily assisting in the operation of a planer by direction of the foreman. His testimony showed, among other things, that he knew the purpose of the planer and could have seen the uncovered knives in it if he had looked; that he put his hand on the machine without looking, in order to increase his strength while attempting to turn a wheel for the purpose of releasing a board which had stuck; and that his hand came in contact with the knives. *Held*, that he was guilty of contributory negligence. *Gossens v. Mattoon Mfg. Co.* 406

MAXIMS.
Stare decisis, 217, 574.

MEANDER LINE. See WATERS, 4.

MEASURE OF DAMAGES. See DAMAGES.

MILLS AND MILL-DAMS. See WATERS, 1.

MINORS. See EQUITY, 3–6. ESTATES OF DECEDENTS, 2–4. MASTER AND SERVANT, 1. TRUSTS.

MISTAKE. See EQUITY, 2. VENDOR AND PURCHASER, 10.

## MORTGAGES.

See CHATTEL MORTGAGES. DEEDS. FIXTURES. GARNISHMENT. JUDGMENT, 3.

1. Where a deed of land, absolute in form, and a contract back were executed for the sole purpose of securing a loan, the legal title did not pass but remained in the grantor the same as if the conveyance had been in form a mortgage. *Cumps v. Kiyo*, 656

2. Upon payment of the loan in such a case no conveyance back is necessary, the grantor being entitled only to demand the execution of such an instrument as would satisfy the mortgage of record. *Ibid.*

3. The fact that property worth $575 had been conveyed by deed for an indicated consideration of $125, and that at the same time a contract back had been executed, specifying the same amount as the purchase price, in connection with the fact that the grantors in the deed continued in possession of the property, is *held* to have been sufficient notice that the transaction created the relation of mortgagor and mortgagee between the parties to put a purchaser upon inquiry which would have disclosed the facts. *Ibid.*

4. Cancellation of the mortgage feature of the transaction in such a case, as by a satisfaction of the land contract on the record thereof, would not divest the mortgagor of the legal title and vest it in the mortgagee. *Ibid.*

5. Sec. 2203, Stats. 1898 (providing that "no mortgage or other alienation by a married man of his homestead . . . shall be valid or of any effect as to such homestead without the signature of his wife to the same"), was not intended to give the wife a mere personal right which she might waive, or be estopped by her conduct from insisting upon, but to protect the home for the benefit of the family and every member of it. Therefore, where a deed, absolute in form, of a homestead was in fact a mortgage, the rights of the mortgagee or those claiming under him could not be enlarged by any acts of the mortgagors other than a literal compliance with the statute, both as to the fact of consent and the manner of manifesting it. *Ibid.*

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6. A mortgage given to secure a guaranty that a judgment assigned by the mortgagor was a legal judgment was foreclosed more than six years after the cause of action for the breach of guaranty accrued. Judgment was rendered in form for a personal recovery, and it also provided for a deficiency judgment. The mortgage was also erroneously reformed, though the amount of the liability secured was not thereby changed. *Held:*

(1) The judgment, being right on the evidence, except as to the provisions for a personal recovery, must be affirmed except as to such provisions, though rendered on an erroneous theory as to the character of the mortgage.

(2) The statute of limitations upon the personal liability having extinguished it, the provisions in the judgment for a personal recovery, whether by the judgment as originally rendered or a deficiency judgment to be thereafter rendered, were erroneous. *Duecker v. Goeres*, 29

7. Sec. 3162, Stats. 1898, prescribing the form of a foreclosure judgment, is mandatory, and provides for a personal recovery only by means of a deficiency judgment, and in that case only against the person personally liable. The rendition of a judgment otherwise is erroneous, though where such judgment is in the form of a personal recovery and also authorizes a judgment for a deficiency, where such judgment is proper, the two will be so construed as to give the provision for a personal recovery without a deficiency judgment the effect, only, of a determination of the amount secured by the mortgage. *Ibid.*

## MUNICIPAL CORPORATIONS.

*Streets and sidewalks: Injuries from defects, etc.*

1. The charter of the city of Fond du Lac provided (sec. 4, subch. 18, ch. 152, Laws of 1883) that the city should not be liable for injuries resulting from defects in the streets caused by the neglect of any person or corporation until all legal remedies should be exhausted against the party primarily liable; also (sec. 4, ch. 435, Laws of 1889) that no action for such injuries should lie against the city unless commenced within one year after the injury. Ch. 471, Laws of 1889 (sec. 1340*a*, Stats. 1898), provided that in such cases the city and party primarily liable might be sued in the same action, and that in an action against one the other might be made a party by amendment of the complaint. *Held*, that it was not essential to a liability of the city that the action against the person primarily liable should be commenced within one year. *Schaefer v. Fond du Lac*, 39

2. Plaintiff in such a case proceeded with diligence against the party supposed to be primarily liable and obtained judgment. Afterwards, within one year after the injury, he sued the city, which alleged that another person was primarily liable; and on appeal from a judgment against the city it was so decided. Thereupon, it being then about three years after the injury, the plaintiff made such person a party. *Held*, that he was not guilty of such laches in proceeding against the party primarily liable as would defeat a recovery against the city. *McFarlane v. Milwaukee*, 51 Wis. 691, distinguished and its applicability, since the enactment of ch. 471, Laws of 1889, doubted. *Ibid.*

3. The provision of sec. 1339, R. S. 1878, requiring, as a condition precedent to an action, that notice of injuries from a defective high-

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way be given within ninety days was not (under sec. 4986) applicable to cities having special and inconsistent charter provisions. By ch. 236, Laws of 1897, said sec. 1339 was amended so as to limit to fifteen days the time for giving notice in case of a city. *Held*, that the amendment did not extend the application of the section, and that special and inconsistent charter provisions would still prevail. *Harris v. Fond du Lac*, 44

4. A provision in a city charter requiring notice of an injury from a defective street to be served upon the street commissioner or sidewalk superintendent of the city or an alderman of the ward in which the injury occurred is not complied with by service on the mayor and city clerk. *Ibid.*

5. An apron or covering over a cement sidewalk, placed there in the winter time when the walk became slippery, was constructed of pine boards laid lengthwise of the walk and fastened to pine cleats laid crosswise, the entire thickness being less than two inches. There was no beveled plank leading from the cement to the top of the covering, but the ends of the boards were sawed off square and the cleat did not come out flush therewith. *Held*, that such covering did not constitute an actionable defect in the sidewalk. *Kleiner v. Madison*, 339

6. In an action for injuries alleged to have been caused by a defect in a sidewalk four feet wide and constructed of planks laid lengthwise, it is *held* that a break and sagging in one of the outside planks, which was but six inches wide, the remainder of the walk being in good condition, did not as a matter of law render the sidewalk defective at that place. *La Fave v. Superior*, 454

7. An instruction in such case that the sidewalk was defective as matter of law is *held* peculiarly liable to mislead the jury, since the nature and location of the break were important upon the question of plaintiff's contributory negligence, especially in view of evidence tending to show that he was intoxicated at the time of the accident. *Ibid.*

8. Where, in an action against a city to recover for injuries caused by a defective sidewalk, the city had admitted notice of the actual condition of the walk, evidence of complaints to the street commissioner and an alderman concerning the condition of the walk at the place in question, and of the introduction by the alderman of an ordinance requiring the walk to be repaired, etc., is inadmissible on the issue as to the existence of a defect; and its admission in this case is *held* a material error. *Selleck v. Janesville*, 570

9. Where notice of the condition of a sidewalk claimed to have caused a personal injury is admitted, so that no proof thereof is necessary, no evidence as to its condition should be received which is too remote to bear on the question whether it was defective at the very time of the accident. *Ibid.*

10. A fall of one inch in ten in a stone apron leading from a sidewalk to a crosswalk, even though combined with a slight lateral inclination, is not an actionable defect. *City of De Pere v. Hibbard*, 666

11. There being no actionable defect on account of the incline in such apron, a slippery condition resulting from ordinary accumulations of ice, when such accumulations are smooth, does not constitute a defect. *Ibid.*

12. It is contributory negligence for a traveler to go upon an inclined apron covered with smooth ice, knowing and appreciating its exact condition. *Ibid.*

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13. In an action against a city for personal injuries occasioned by the horses behind which plaintiff was riding becoming frightened at a steam roller and running away, the evidence (stated in the opinion) is *held* to show, as matter of law, that plaintiff had repeated warnings of the presence of the roller and abundant opportunity to turn upon a side street, and that if she had looked she could have seen the roller down the road 700 feet away. She therefore assumed the risk of driving past it. *Maanum v. Madison*, 272

14. In such case, the claim that the roller was suddenly started as the team approached was not made in the original complaint, but appeared for the first time after plaintiff's examination as an adverse party, and was supported only by the inconclusive and contradictory testimony of plaintiff and her daughters, while it was negatived by every other witness and by every reasonable probability in the case. *Held*, that the court properly refused to submit the issue to the jury. *Ibid.*

*Street sprinkling: Sufficiency of petition.* See CERTIORARI, 6.

*Filling reservoir for street, etc.* See WATERS, 1.

MURDER. See CRIMINAL LAW.

MUTUAL BENEFIT SOCIETIES. See INSURANCE, 1–6.

## NEGLIGENCE.

See BILLS AND NOTES, 8. DAMAGES. EVIDENCE, 7, 8. HIGHWAYS, 5–7. HUSBAND AND WIFE, 4. MASTER AND SERVANT. MUNICIPAL CORPORATIONS. RAILROADS, 11–18, 21–29.

1. A question as to whether defects, found by the jury to have existed under such circumstances that the defendant knew or ought to have known of them, were the proximate cause of the injury, was a sufficient submission of the question of whether defendant was guilty of negligence which was the proximate cause of such injury, in connection with instructions given to the jury, that in order for them to find that such defects were such proximate cause they were required to find from the evidence that the defendant ought reasonably to have apprehended that such defects might probably cause an injury to some person. *Baxter v. C. & N. W. R. Co.* 307

2. An instruction that the proximate cause, in the law of negligence, is the direct and natural cause, is not proper. It is the natural and probable cause, and from which, in the light of attending circumstances, a personal injury might reasonably have been expected by a person of reasonable intelligence and prudence. Such an instruction, however, is not prejudicial in connection with an instruction limiting what is direct and natural to such things as the person responsible ought in the exercise of ordinary care to have apprehended. *Ibid.*

3. It was shown, without dispute, that plaintiff was healthy and robust before the accident in question, in which he received an injury to his back, and that at the time of the trial his spinal column was greatly affected so that he was a helpless paralytic, the symptoms and results having followed in regular sequence and in absolute consistency with a severe injury to the back. The medical experts agreed in the opinion that his condition was attributable to the injury he received, and there was no claim that he had suffered from any other disturbing or producing cause. *Held*, that the fact that the experts disagreed as to the name of his disease, and their testimony that such a disease might result from other causes, did

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not make it necessary to submit to the jury the question whether plaintiff's condition was the natural and probable result of his injury received at the time of the accident. *Crouse v. C. & N. W. R. Co.* 473

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

## NEW TRIAL.

See APPEAL, 15, 17, 19. PHYSICIANS AND SURGEONS, 1.

A motion for a new trial on the ground of newly discovered evidence is properly denied where such evidence consists largely in admissions of the plaintiff and there is no substantial excuse stated for not having the witnesses or their testimony present upon the trial. A mere general assertion of "due diligence" or want of negligence is not enough. *Kurtz v. Jelleff,* 27

NOTICE.
Of appeal: Service, etc. See APPEAL, 5, 20.
Of election: Publication. See ELECTIONS.
Of limitation on power of officer. See ELECTIONS, 4.
Of legal requirements as to publication. See ELECTIONS, 6.
Of application for appointment of administrator. See ESTATES OF DECEDENTS, 2.
Of agreement limiting liability. See GUARANTY, 1, 2.
Of acceptance of guaranty. See GUARANTY, 3.
That deed absolute is a mortgage. See MORTGAGES, 3.
Of injuries. See MUNICIPAL CORPORATIONS, 3, 4.
Of condition of sidewalk. See MUNICIPAL CORPORATIONS, 8, 9.
Of delays at junctions. See RAILROADS, 11.
Of defects in locomotive. See EVIDENCE, 7, 8. RAILROADS, 27.

OFFICERS.
State officers. See ESTOPPEL.
Governor. See TAXATION, 4.
County clerk. See ELECTIONS.
Clerk of circuit court. See APPEAL, 5.
Register of deeds. See REGISTER OF DEEDS.
Of city: Notice of injuries. See MUNICIPAL CORPORATIONS, 4.
Of benefit society: Admissions. See INSURANCE, 5.

OPINION evidence. See DAMAGES, 3. EVIDENCE, 4–7, 13. HIGHWAYS, 2. NEGLIGENCE, 3.

## PARTIES.

See CORPORATIONS, 1–3. EQUITY, 3. ESTATES OF DECEDENTS, 1. EVIDENCE, 1, 14. INSURANCE, 8–10. MUNICIPAL CORPORATIONS, 1, 2.

1. Subscribers to a fund for the construction of a church, who have built the church and incurred obligations therefor on the faith of the subscriptions, are the real parties in interest who may maintain an action to collect an unpaid subscription. *Hodges v. Nalty,* 464

2. In such a case seventy-five is *held* a sufficient number to justify the court in allowing one or more to sue for all under sec. 2604, Stats. 1898, on the ground that the parties are very numerous and that it would be impracticable to bring them all before the court. *Ibid.*

3. A promise to pay such a subscription, even if made directly to a committee, is *held* to have been made to them as agents for all the

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subscribers who should join in the enterprise, and the latter, as principals, may maintain an action upon it. *Ibid.*

4. The liability of each subscriber to such a fund is a several one, and hence is to be enforced in an action at law against him alone. *Ibid.*

5. The owners in being of real estate, for all the purposes of litigation affecting the jurisdiction of the court to deal with the whole title, stand not only for themselves but for all that may come after them; and, generally speaking, persons in being having only contingent interests are deemed to be represented by the owners of the precedent estate of inheritance. *Ruggles v. Tyson,* 500

## PARTNERSHIP.

See TAXATION, 3, 4.

1. In an action between attorneys for an accounting and settlement of partnership transactions involving services rendered for a single client, a finding of the trial court that the partnership agreement was a conditional one and that the services in question were rendered by the defendant before conditions precedent to the completion of the partnership agreement had been performed, are *held* to be against the clear preponderance of the evidence. *Bundy v. McLean,* 263

2. Where the plaintiffs in such case were ready at all times to render legal services under the partnership agreement, the fact that little work was done by them gave the defendant no right to more than his agreed share of the earnings. *Ibid.*

3. One of the plaintiffs and the defendant entered into a partnership agreement with the understanding that the other plaintiff should be a party thereto after a certain date. After the business of the partnership was fully consummated the defendant refused to account for money received in conducting it. *Held,* that an action for an accounting was the proper remedy by which to enforce plaintiffs' rights. *Ibid.*

PAYMENT. See BILLS AND NOTES, 4–6. CONTRACTS, 1. RAILROADS, 1–3. VENDOR AND PURCHASER, 4.

PENALTY. See RAILROADS, 16.

PHOTOGRAPHS. See EVIDENCE, 9–11.

## PHYSICIANS AND SURGEONS.

See DAMAGES, 3, 4. EVIDENCE, 13. HIGHWAYS, 2. HUSBAND AND WIFE, 4. INSURANCE, 5, 6. NEGLIGENCE, 8.

1. In an action against a physician for malpractice in treating plaintiff for a fractured wrist, it is *held* that the evidence wholly failed to show, except as to one of the several items or phases of the injury, that they resulted from any negligence or malpractice on the part of defendant or that they were not the natural and legitimate results of the accident; and it appearing, from the method of the trial and from the size of the verdict, that the jury did not confine themselves to the one phase of injury as to which a recovery could be sustained, but awarded damages for injuries which the defendant did not cause, the verdict should have been set aside as contrary to the evidence. *Kickhoefer v. Hidershide,* 126

2. The question being as to whether defendant had failed seasonably to administer passive motions to plaintiff's hand, and a witness for



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plaintiff having testified to giving movement to the hand some weeks after the accident, it was error to refuse to permit him to be asked, on cross-examination, whether he had at any time heard defendant advise plaintiff to give passive motions to the hand, and whether plaintiff had told him (witness) that she had had passive motions given before he gave them. *Ibid.*

## PLEADING.

See APPEAL, 2, 4. CERTIORARI, 2. CRIMINAL LAW, 18-20. EQUITY, 7. GARNISHMENT, 2. LIBEL AND SLANDER. PRACTICE, 1. PUBLIC LANDS. TRUSTS, 5. WATERS, 4.

1. An oral decision allowing an amendment of the complaint is sufficient, and the court's declaration of what the decision was, reduced to writing and signed ten days later *nunc pro tunc*, will not be disregarded on appeal, at least upon the conflicting recollection of counsel. *Findlay v. Knickerbocker Ice Co.* 375

2. A general demurrer to a complaint, after answer, put in by stipulation and treated by both parties and the trial court as an ordinary demurrer, is so treated upon appeal from an order sustaining it. *McCord v. Hill,* 457

POSSESSION of land. See ADVERSE POSSESSION. DEEDS. MORTGAGES, 8.

POWERS. See EQUITY, 3-6.

## PRACTICE.

See APPEAL AND ERROR. CERTIORARI. COSTS. COURT AND JURY. CRIMINAL LAW AND PRACTICE. ESTATES OF DECEDENTS. EVIDENCE. INSTRUCTIONS TO JURY. JUDGMENT. JUSTICES' COURTS. NEW TRIAL. PARTIES. PLEADING. REPLEVIN, 1. SERVICE OF SUMMONS. VERDICT.

1. In an action upon a promissory note, where a defendant's answer denying the making of the note was not sufficiently specific, under sec. 4192, Stats. 1898, to put in issue the genuineness of his signature, it was within the discretion of the court, under secs. 2830, 2831, to permit him, on the trial, to raise that issue by filing the required affidavit, without granting a continuance thereupon asked for by plaintiff, no prejudice to the latter being shown. *Withee v. Simon,* 116

2. The trial court may, in its discretion, without the consent of counsel, permit the jury, while deliberating, to examine the exhibits. *Wunderlich v. Palatine F. Ins. Co.* 382

3. The right to a jury trial of an action is waived by participating, without objection, in its trial as an equitable action. *Charles Baumbach Co. v. Hobkirk,* 488

PREFERENCES. See VOLUNTARY ASSIGNMENT.

PRESCRIPTION. See ADVERSE POSSESSION.

PRESUMPTIONS. See ADVERSE POSSESSION. SIGNATURES, 2. TOWNS, 1. WATERS, 4.

PRIMARY LIABILITY. See MUNICIPAL CORPORATIONS, 1, 2.

PRINCIPAL AND AGENT. See BILLS AND NOTES, 4-6. HUSBAND AND WIFE, 1. INSURANCE, 5, 11. PARTIES, 3. RAILROADS, 7, 15. SALE OF CHATTELS, 2.

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PRINCIPAL AND SURETY. See ESTATES OF DECEDENTS, 4, 5. GUARANTY.
PRIVILEGED COMMUNICATIONS. See INSURANCE, 6.
PRIVITY. See JUDGMENT, 6–8, 10, 12.
PROMISSORY NOTES. See BILLS AND NOTES.
PROMOTERS. See CORPORATIONS, 8.
PROVISIONAL REMEDIES. See REPLEVIN, 1.
PROXIMATE CAUSE. See DAMAGES, 2. HIGHWAYS, 5. NEGLIGENCE. RAILROADS, 25.

## PUBLIC LANDS.

A complaint which seeks to have the court adjust equities between rival claimants to government land is fatally defective if it fails to show that the United States has parted with the title and that it has become vested in the individual against whom it is sought to enforce the supposed equities. *McCord v. Hill*, 457

PUBLICATION.
Of election notices. See ELECTIONS.
Of summons. See SERVICE OF SUMMONS.
PUNITIVE DAMAGES. See INSTRUCTIONS TO JURY, 5. REPLEVIN, 4.

## RAILROADS.

*Condemnation of land: Failure to pay damages: Injunction.*

1. Under our statutes no permanent right is acquired in land condemned for a railroad until the damages as finally determined have been paid or their payment provided for as prescribed by law. *Stolze v. M. & L. W. R. Co.* 47

2. After the commissioners of appraisal had filed their award in condemnation proceedings, the railroad company deposited the amount thereof with the clerk of the court, and thereupon entered upon the lands condemned, made excavations for its roadway, and constructed its track. This was done without the consent of the owners, who never voluntarily relinquished the possession of the land. Upon an appeal from the award the owners obtained judgment for a much larger sum, but this was never paid, tendered, or deposited, and an execution on the judgment was returned unsatisfied, the company being insolvent. *Held*, that the owners, having no adequate remedy at law by action in ejectment, were entitled to an injunction against said company and others claiming under it, restraining the operation of the road until payment should be made. *Ibid.*

3. Although, in such case, the road was in the possession of receivers, appointed by a federal court, of the property of a company to which the road had been leased, it was not necessary to obtain leave from that court before maintaining the action for an injunction in a state court. *Ibid.*

*Condemnation of crossing for electric railway: Writ of assistance: Mandamus.*

4. A railroad company, incorporated under sec. 1820, Stats. 1898, for the purpose of carrying persons only, endeavored to condemn a right of way for a trolley electric line across the right of way of a steam railroad company, and prosecuted the proceedings to a successful termination in the circuit court. From the judgment of that court

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the steam railroad company appealed, and gave an undertaking to protect the petitioner from loss in case it should be finally determined that the petitioner was entitled to a crossing. Pending the appeal the petitioner applied for a writ of assistance to put it in possession of the crossing, and upon the writ being refused sought to compel its issuance by *mandamus*. No urgent necessity appearing why the crossing should be put in until the petitioner's right thereto was finally determined, the writ of *mandamus* is denied. In order to justify *mandamus* in such a case it must appear that the duty of the circuit court was plain, the refusal to perform it clear, the result of the refusal prejudicial, and the remedy by writ of error or appeal utterly inadequate. *State ex rel. O., A. & B. W. R. Co. v. Burnell*, 246

*Carriers: Breach of contract: Transporting animals: Delays.*

5. Whether a contract by a railway corporation to transport merchandise between two points, neither of which is on its own line — over which, however, most of the carriage is to be — is *ultra vires*, not decided. *Bigelow v. C., B. & N. R. Co.* 109

6. In an action for the breach of such a contract, brought against the railway company by one whom the company, by making the contract, had induced to buy the merchandise to be transported, the company cannot invoke the doctrine of *ultra vires* as a defense. *Ibid.*

7. The evidence in this case — showing, among other things, that the freight agent of the defendant railway company at a certain city, as also his predecessors, had always represented the company in its dealings with freighters on the tracks of other roads and also with reference to certain establishments outside the city limits, and tending to show, by certain correspondence between the general freight agent and the local agent as to the transaction in question, the understanding of both that such dealings were within the province and duty of the latter — is *held* to support the conclusion of the jury that the local agent had actual authority to contract for the carriage of certain freight situated outside the city limits and not on defendant's tracks. *Ibid.*

8. Where the defendant railway company, in order to induce plaintiff to buy certain ice, promised to transport it for him at certain rates from the place on another line where it then was, and on the faith of such promise he bought the ice, there is a sufficient consideration for the contract of carriage. *Ibid.*

9. A notification of the plaintiff by the company, in such case, that it could not furnish him cars and take the ice from where it was, sufficiently shows a breach of the contract, and repeated demands by plaintiff were unnecessary. *Ibid.*

10. After plaintiff had been so induced to buy the ice, he sold it to one who agreed to purchase at an advanced price and pay the freight provided the ice could be transported according to defendant's promise; and, but for defendant's breach of such promise, plaintiff would have received such advanced price. *Held*, that the measure of damages for such breach of contract was said price, less the expenses of shipping the ice, and less, also, such sum as might have been obtained for it upon sale to other parties, together with interest from the commencement of the action; but it appearing that, though unable to sell to others, plaintiff might, by incurring additional expense — far less than the damage otherwise to result — have availed himself of the sale mentioned, and that he

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made no effort in that behalf, but allowed the ice to melt, he cannot recover for so much of the loss as he might, by reasonable diligence, have avoided. *Ibid.*

11. Where the route over which horses are shipped is not a continuous line, but a combination of various lines, not traversed by any train for the whole distance continuously, the shipper is charged with notice of delays at junctions, indicated upon the scheduled time-tables, and such delays can form no ground for a charge of negligence against the carrier. *Burns v. C., M. & St. P. R. Co.* 646

12. Where in such a case the carrier agreed to place the cars at the end of a private spur track which the shipper had a right to use by agreement with the owner, delay in transit occasioned by an agreement between such owner and the carrier that the spur should be used for switching in the afternoon only does not constitute negligence on the part of the carrier. *Ibid.*

13. A provision in a special contract for the transportation of horses that the owner shall "bear the expense" of feeding and watering during transportation does not relieve the carrier from the obligation to furnish upon request the requisite opportunities for unloading the stock for that purpose, even though an employee of the shipper receives free transportation in order that he may care for them. *Ibid.*

14. The fact that about 2:30 o'clock p. m., after the horses had been in the cars more than thirty-three hours, the owner told the carrier's agent at the station where the cars were then standing that the horses ought to be fed and watered, and that unless they reached their destination on the spur track before dark they could not be unloaded that night, is *held* equivalent to a request that the cars be placed at some point where feeding and watering could be done. *Ibid.*

15. The carrier's agent in such a case is chargeable with notice of the length of time the horses had been in the cars. *Ibid.*

16. Secs. 4386, 4387, R. S. of U. S. (providing that no railroad company carrying stock from one state to another shall confine the same in cars for a longer period than twenty-eight hours without unloading for rest, etc., for five consecutive hours, and that if the owner fails to feed and water the stock when unloaded the company shall do so at the owner's expense), imposes a duty upon the company for the benefit of the owners of stock transported, and failure to perform that duty constitutes actionable negligence at the suit of an owner who is injured thereby. The fact that a penalty is imposed for a breach of such duty does not prevent a civil action based on such negligence, the penalty not being given to the injured party in satisfaction for the injury. *Ibid.*

17. It was not negligence for persons in charge of the horses, after their arrival in the morning at the station nearest the spur track upon which the cars were to be placed for unloading, to rely on promises by the carrier's servants and agents that the horses would be forwarded presently, nor to omit an attempt to unload and feed them at 2:30 p. m., when only two hours remained in which to do it. *Ibid.*

18. Failure to unload the horses upon their arrival at the spur track after dark is *held* not to constitute negligence as matter of law, where the evidence showed that the night was dark and snowy; that the cars were in the woods, half a mile from the place to which the horses were being taken; that there were no conveniences for

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unloading, but temporary platforms would have to be erected; and that unloading them upon such platforms in the dark was a hazardous undertaking. *Ibid.*

*Fences: Depot grounds: Gate at farm crossing.*

19. Where the grounds left unfenced and treated by a railway company as depot grounds are unusually extensive and the *locus in quo* is outside of and beyond the switches and side tracks, and is not used as a place of access by the public or patrons, either for freight or passengers, and only for the passing or standing of trains, the question whether it is necessary for and used as depot grounds is properly for the jury. *Cole v. D., S. S. & A. R. Co.* 460

20. Under sec. 1810, Stats. 1898, a railway company is absolutely liable for the killing of animals if they came upon its road at a point (not in fact depot grounds) where it was unfenced, even though it omitted the fence in good faith because it considered the locality depot grounds. *Ibid.*

21. A railroad company which has constructed a gate at a farm crossing, safe and ample for all ordinary purposes, is not chargeable with negligence because, by the owner's use of the roadway of the crossing, the ground under the gate had been worn down so far as to permit a child to creep under the gate and get upon the track. *Friend v. C. & N. W. R. Co.* 663

*Negligence: Killing of child on track.*

22. Where a child is run over by a train at a point where the employees of the railway company had no reason to anticipate the presence of any person on or near the track, in order to warrant a recovery on the ground of negligence in the management of the train the employees must have been guilty of gross negligence or wanton or wilful misconduct. *Friend v. C. & N. W. R. Co.* 663

*Negligence: Injury to traveler on highway.*

23. In an action against a railway company for injuries received by being thrown from a wagon drawn by a runaway team alleged to have been frightened at a street crossing by reason of the negligence of defendant's flagman in failing to give warning of the approach of a train, it appeared conclusively that plaintiff failed to look in the direction whence the train was coming until after the horses became frightened, and that, had he looked, he could have seen down the track in that direction more than 170 feet. *Held*, that the plaintiff was guilty of contributory negligence precluding a recovery. *Walters v. C., M. & St. P. R. Co.* 251

24. Failure of the flagman at a street crossing to give warning of the approach of a train which stopped before reaching the street would not render the company liable for injuries received by a traveler as the result of his team becoming frightened at the train. *Ibid.*

25. The running of a train at an unlawful rate of speed is not the proximate cause of injuries received by a traveler by reason of his horses taking fright at its approach. *Ibid.*

*Negligence: Injuries to employees.* See EVIDENCE, 7, 8.

26. In an action against a railroad company for injuries sustained by a fireman by being thrown from a moving engine while attending to the headlight by reason of a defective step, the evidence (showing, among other things, plaintiff's previous knowledge of the defect and that it was not necessary for him to use the step at the time of his injury) is *held* to show contributory negligence. *Kerrigan v. C., M. & St. P. R. Co.* 166

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27. It being undisputed that reports of such defects were to be made or notice thereof given to the roundhouse foreman, the fact that plaintiff had requested a boiler repairer to fix the defective step and that the latter did or attempted to do so, did not relieve plaintiff from an assumption of the risk. *Ibid.*

28. In an action against a railway company for injuries to a locomotive engineer caused by a washout at a culvert, the evidence (showing, among other things, that the culvert was two feet square and had existed a number of years without being washed out; that the water from quite an extended tract of land was drained through it, and sometimes dammed up and required time to get through; that the ground in which it was placed was sand and gravel; that the gravel on one side of the roadbed had recently been dug away to the depth of several feet: that a partial washout had occurred several weeks previously, which had caused one end of the culvert to drop down; and that when workmen went to replace it they found the planks old and rotten), is *held* to sustain findings of the jury that the culvert was not so constructed and maintained as to conduct through it the water reasonably to be anticipated as likely to come there during a series of years, and that it was so negligently and carelessly constructed and maintained as to be inadequate for that purpose. *Crouse v. C. & N. W. R. Co.* 473

29. In such a case a refusal to submit for special verdict questions as to whether a man of ordinary prudence under the circumstances would have excavated the gravel at the side of the track, and whether he ought reasonably to have expected that such excavation would be likely to cause an injury to defendant's servants, is *held* to have been proper in view of the undisputed fact that the culvert had partially washed out a few weeks before the accident by reason of the excavation, and the finding that the culvert was negligently constructed and maintained. *Ibid.*

REAL PROPERTY. See ADVERSE POSSESSION. BOUNDARIES. CORPORATIONS, 2–9. DEEDS. EQUITY. FIXTURES. INJUNCTION. MORTGAGES. PARTIES, 5. PUBLIC LANDS. RAILROADS, 1–3. RELIGIOUS SOCIETIES. TAXATION, 2–4, 6. TRUSTS. VENDOR AND PURCHASER. WASTE. WATERS. WILLS, 2–4.

REASONABLE DOUBT. See CRIMINAL LAW, 7.

RECEIVERS. See RAILROADS, 3.

RECORD. See APPEAL, 6–12.

REFORMATION of instruments. See EQUITY, 1, 2.

## REGISTER OF DEEDS.

Prior to 1895 every register of deeds received fees as his sole compensation except where such fees amounted to less than $300. Ch. 169, Laws of 1895, made the office a salaried one in counties having a population of 150,000; and ch. 165, Laws of 1897, authorized the county board of any county not containing a city having more than 20,000 inhabitants to make the office a salaried one. The revision of 1898 provides (sec. 764) that "*every* register of deeds" shall receive certain fees, etc., except (sec. 764*a*) that in counties having a population of 150,000 he shall receive a salary in lieu of fees — these provisions being substantially the same as those in force prior to the enactment of ch. 165, Laws of 1897. No other provisions in respect to the register's compensation are contained in the revision of 1898. The act of 1897 is not included therein, nor is it among

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the laws specifically repealed (sec. 4978), although the act of 1895 is among the latter. Sec. 4978 repeals, however, in addition to the acts enumerated therein, "all other acts and parts of acts, the subjects whereof are revised and re-enacted in these statutes, or which are repugnant to the provisions herein contained." It appears from the legislative journals that the joint committee on revision recommended that ch. 165 be omitted on the ground that it was unconstitutional. *Held*, that the whole subject of the compensation of registers of deeds was revised and covered by the revision of 1898, and that ch. 165, Laws of 1897, was repealed thereby. *Dane County v. Reindahl*, 302

## RELIGIOUS SOCIETIES.

See TAXATION, 2.

1. Land conveyed to an archbishop of the Roman Catholic church by a deed running to him as an individual, without official or fiduciary designation, is *prima facie* owned by him absolutely. *Katzer v. Milwaukee*, 16
2. The facts that such land was purchased by the diocesan officers with funds of the diocese as a residence for the archbishop, and that it was customary in such cases to take the conveyance to the archbishop individually, and his testimony that he held the property in fee simple according to the laws of the church; that he made no claim to any individual ownership, but held it in trust for the diocese; and that he is required to devise it to his successor — are *held* insufficient to show any legally enforceable trust for a religious association. *Ibid.*
3. Courts will not take judicial notice of the "laws of the Roman Catholic church." *Ibid.*
4. Although sec. 2001—10, Stats. 1898, recognizes the bishop as the only trustee of each Roman Catholic church in his diocese, sec. 2000 does not create any statutory trust in property held by him, because in the former section the latter is expressly declared to be inapplicable to said church. *Ibid.*

REMISSION of damages. See APPEAL, 17, 18. DAMAGES, 5.

## REPLEVIN.

1. The provisional remedy in a replevin action under the Code, to obtain immediate possession of the subject of the controversy, is not essential to the commencement or maintenance of the action, hence any error in such proceeding does not affect the jurisdiction of the court to entertain such action and proceed therein to judgment. *Hart v. Moulton*, 349
2. For a tortious taking of personal property amounting to a conversion, the owner, when he cannot obtain his property, may recover in replevin its value *at the time of the taking*, and interest from that time. *Findlay v. Knickerbocker Ice Co.* 375
3. Where in such a case the owner recovers either the possession of the property or its value as of a later date than the tortious taking, he may recover in addition, as damages, any depreciation in the value of the property which has taken place from any cause pending the detention, even though such depreciation was not due to defendant's fault or neglect. *Ibid.*

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4. An ice-house, in which plaintiffs had stored ice pursuant to a renting partly oral and partly by letter, was purchased by defendant, who also received a bill of sale, in general terms, of personal property. Plaintiffs were about to remove the ice, but defendant, being in doubt as to whether it had been transferred by the bill of sale or was the property of the vendor of the ice-house, demanded evidence of plaintiffs' title. Plaintiffs refused to furnish such evidence, although they might easily have done so, and defendant thereupon refused to permit them to remove the ice unless they exhibited a lease. No wrong motive, malice, or wantonness in the withholding of the ice being shown, plaintiffs were not entitled, in replevin, to recover punitory damages. *Ibid.*

5. In replevin for a quantity of ice it appeared that the ice had dwindled from 1,800 tons at the time of the seizure by defendant to forty tons at the time of the trial, and had become a conglomerate mass not worth the cost of removal. *Held*, that the property in controversy had become practically nonexistent, and that an insufficient description thereof in the verdict and the failure to find the value per ton so as to enable delivery of a part in diminution of the recovery were immaterial errors. *Ibid.*

RES ADJUDICATA. See JUDGMENT, 5–13.

RESCISSION of contract. See HUSBAND AND WIFE, 1. SALE OF CHATTELS, 1.

RETROSPECTIVE LAWS. See WILLS, 8.

RETURN.
On appeal. See APPEAL, 7–9.
To writ of *certiorari*. See APPEAL, 4. CERTIORARI, 2.

REVERSAL. See APPEAL, *Affirmance and reversal.*

RIPARIAN RIGHTS. See WATERS, 3, 4.

ROADS AND STREETS. See HIGHWAYS. MUNICIPAL CORPORATIONS.

ROMAN CATHOLIC CHURCH. See RELIGIOUS SOCIETIES.

RULES OF COURT.
County Court Rule III (Guardians *ad litem*), 165.

SALARIES. See REGISTER OF DEEDS.

## SALE OF CHATTELS.

See FIXTURES. INSURANCE, 9, 11–13. LOGS AND LUMBER, 1, 2.

1. A purchaser of goods knew or had reason to believe that he was insolvent but, not being asked in respect thereto, did not disclose the fact to the vendor. After receiving the goods, and on the same day that he finished placing them in his store building, he gave chattel mortgages thereof to a bank and others. At the time he gave the order he intended to pay for the goods, and he had no thought of giving the mortgages until the goods were in the store and suit had been threatened by another creditor. *Held*, that the sale was complete, without fraud, before the giving of the mortgages, and that the vendor could not rescind it and retake the goods. *Consolidated Milling Co. v. Fogo*, 92

2. Statements made to the vendor's agent by the assistant cashier of the mortgagee bank, before the sale, as to the financial standing of the purchaser, which influenced the vendor to fill the order, are *held* not binding on the bank, having been made in a casual conversation and not in the transaction of any business between the bank and such agent. *Ibid.*

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8. A sale of property procured by false representations, and a purchase with existing intent on the part of the purchaser not to pay for the subject of his purchase, are distinct actionable wrongs. The former is complete without the existence of an intent not to pay for the property, and the latter is complete though there be no false representations to induce the sale. In case of the latter wrong, false representations and undisclosed insolvency are not necessary elements, but are evidentiary facts tending to establish the intent not to pay, though the latter of itself is not sufficient to establish such fact. *Hart v. Moulton*, 349

SALE OF LAND. See DEEDS. INJUNCTION. VENDOR AND PURCHASER.

SALES FOR TAXES. See INJUNCTION.

SATISFACTION. See MORTGAGES, 2.

SELF-DEFENSE. See CRIMINAL LAW, 11, 12.

SERVICE of notice of appeal. See APPEAL, 5.

SERVICE of notice of injury. See MUNICIPAL CORPORATIONS, 4.

## SERVICE OF SUMMONS.

Under sec. 2640, R. S. 1878 (providing that the order directing publication of a summons shall also contain a direction that a copy be deposited in the postoffice addressed to the defendant, or a direction that such deposit may be omitted because the defendant's postoffice address cannot be ascertained), an order for publication containing neither a direction for mailing nor a direction that the mailing may be omitted is fatally defective, and no jurisdiction of the person sought to be served is acquired by the publication. *O'Malley v. Fricke*, 280

SETTLEMENT.
Of action. See DURESS.
Of lands. See EQUITY, 3–9.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 5–12.

## SIGNATURES.

See JUSTICES' COURTS, 2. PRACTICE, 1.

1. Except as controlled by statute a mark made for one's signature is good whether he could write or not and whether witnessed or not; and our statute (subd. 19, sec. 4971, Stats. 1898) has made no change in the rule, except that a person can sign by his mark only when he is unable to write. *Finlay v. Prescott*, 614

2. Under sec. 4192, Stats. 1898, a written instrument purporting to have been signed by a person by making his mark is, unless such person shall have died previous to the requirement of the proof, *prima facie* evidence that he was unable to write his name, that he therefore made his mark in lieu of a written signature, and that the mark was made by the person by whom it purports to have been made. *Ibid.*

SLANDER. See LIBEL AND SLANDER.

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SURFACE WATERS. See WATERS, 2.

## TAXATION.

See TOWNS, 2.

1. Statutes exempting property from taxation are to be strictly construed, and if the meaning of such a statute is fairly ambiguous or uncertain as to a specific piece of property or owner, it is the duty of the court to resolve the doubt in favor of the taxability of the property. *Katzer v. Milwaukee*, 16
2. A parsonage to be exempt from taxation under subd. 3, sec. 1038, Stats. 1898, unless rented, must be owned by the religious association, just as much as its church building or other real estate. *Ibid.*
3. Ch. 429, P. & L. Laws of 1867, exempting from taxation lands granted by Congress to aid in the construction of a military road, limited such exemption to the "time that the title to such lands shall remain in the state or in the contractor to construct said road or his assigns." The contract could be assigned only with the consent of the commissioners and upon the giving of a bond by the assignees

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for its full performance. After the acceptance of a bid for the work, but before the execution of the contract by the successful bidder, two persons agreed with him to pay him a certain sum per mile for so much of the road as the three might decide should be built, he agreeing to build that portion of the road and that they should receive three fourths of the land earned thereby. *Held*, that said persons were not co-contractors for the work nor assigns of the contractor, within the meaning of the act of 1867, so as to make their shares of the lands earned exempt while held by them. *Grunert v. Spalding*, 193

4. The fact that a patent for a portion of the lands earned was issued by the governor to one of said persons "as partner and assignee of" the contractor does not conclusively show that he was such so as to entitle him to the exemption, as the result either of a practical construction of the contract or of an estoppel. *Ibid.*

5. Statutes exempting property from taxation, if open to construcion, should be construed strictly against the exemption. *Douglas County Agr. Soc. v. Douglas County*, 429

6. Subd. 4, sec. 1038, Stats. 1898 (exempting from taxation lands "owned" and used by any county agricultural society exclusively for fair grounds), and subd. 17 (exempting "property of" any industrial or agricultural fair corporation, used exclusively for such exhibitions, not exceeding eighty acres of land), were not intended to exempt from taxation mere leased lands. *Ibid.*

TAX SALES. See INJUNCTION.

TENDER. See VENDOR AND PURCHASER, 9.

TITLE to land. See ADVERSE POSSESSION. CORPORATIONS, 2–9. DEEDS. EQUITY. FIXTURES. INJUNCTION. MORTGAGES. PARTIES, 5. PUBLIC LANDS. RAILROADS, 1, 2. RELIGIOUS SOCIETIES. TRUSTS. VENDOR AND PURCHASER. WILLS, 4.

## TOWNS.

See HIGHWAYS.

1. It will be assumed, at least in the absence of a clear showing to the contrary, that a county board, in the exercise of the discretion delegated to it in respect to the formation of towns, was controlled by proper motives and sufficient reasons. *Grunert v. Spalding*, 193

2. A single tract of land, surrounded by an unbroken boundary line and capable of being traversed from one extremity to the other without leaving its territory, may, in the discretion of the county board, be designated as a town, even though it has a length of 110 miles and at places is but two or three miles wide; and all the lands embraced within the limits of a town so designated will be within the taxing jurisdiction of its officers. *Ibid.*

3. Under the provisions of sec. 674, S. & B. Ann. Stats., if an ordinance of the county board dividing a town has not been vacated by a court of competent jurisdiction, its validity cannot be called in question, after the expiration of two years from its date, on the ground either that it was not published as required by said sec. 674, or that the consent of the commissioners of public lands was not obtained as required by sec. 258e. *Spooner v. Minong*, 425

4. Under secs. 672, 960*g*, S. & B. Ann. Stats., when a new town was created from part of a town already existing and the indebtedness

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of the old town was apportioned, the two towns did not become joint debtors, but the old town remained legally liable for the whole debt, and the new town became liable to the old town for its share; and payment of the whole debt by the old town was not a condition precedent to the recovery of such share from the new town. *Ibid.*

TRANSACTIONS with persons since deceased. See EVIDENCE, 1, 14.

TRANSCRIPT. See JUDGMENT, 1-8.

TRIAL. See PRACTICE.

TRIAL BY JURY. See COURT AND JURY, 2. PRACTICE, 8.

## TRUSTS AND TRUSTEES.

See RELIGIOUS SOCIETIES. VENDOR AND PURCHASER, 10. VOLUNTARY ASSIGNMENT.

1. Where the interest of minors in lands which had been devised to them subject to a life estate in the testator's widow was sold by their guardians and the proceeds invested in other lands, title to which was taken in the name of the widow, who was one of the guardians, the last-mentioned lands became impressed with a trust in favor of the wards. *Hill v. True*, 294
2. Upon the settlement of the testator's estate in such case personal property remained, title to which passed to said wards under a residuary clause in the will. Such property was also sold by the guardians, the proceeds invested in lands, and the title taken in the name of the widow. *Held*, that such lands also became impressed with a trust in favor of the wards, and that upon a sale thereof other lands purchased in the widow's name with the proceeds became impressed with the trust. *Ibid.*
3. The widow having subsequently transferred the trust property or its proceeds to one of the wards who, though she had knowledge of the rights of the other ward, her brother, nevertheless attempted to dispose of the same by her will to the exclusion of the brother, the latter may maintain an equitable action, against the executor of his sister's will and the legatees, to determine his rights in the property. *Ibid.*
4. The circuit court may properly take jurisdiction in such a case, since the controversy relates to real estate or its proceeds, and plaintiff seeks to have the same charged with a trust in his favor, and to have the title adjudged to be vested in him, which could not be done in the county court. *Ibid.*
5. Allegations in the complaint in such a case that the transactions by reason of which the trust in plaintiff's favor arose took place in 1865 and the years following, while he was a minor, but that he had no knowledge of the terms of his father's will under which he claimed until after the death of his sister in 1897, shortly after which this action was commenced, do not show that his right of action was barred under the statute of limitations. *Ibid.*

ULTRA VIRES. See RAILROADS, 5, 6.

UNDERTAKING on appeal. See APPEAL, 21.

UNDUE INFLUENCE. See WILLS, 1, 5, 6.

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## VENDOR AND PURCHASER OF LAND.

See DEEDS. FIXTURES. MORTGAGES, 1–5.

1. The general rule is that a vendor of real estate has an equitable right to a lien thereon to secure unpaid purchase money, though such right is not an interest in the land, but the mere capacity to acquire an interest through the interposition of a court of equity. *Berger v. Berger*, 282

2. The right to a vendor's lien for unpaid purchase money may be abrogated by statute, but in the absence of such a statute it is not lost by the death of the vendee. *Ibid.*

3. Sec. 2271, Stats. 1898, providing that a homestead, in case of the death of its owner without having lawfully devised the same, shall descend to his heirs free of all claims or liens, with certain exceptions not including liens for unpaid purchase money, abrogates, as to such property, the common-law right to acquire a vendor's lien thereon. *Ibid.*

4. By a land contract the purchasers bound themselves to pay the purchase price in instalments at specified times, and the vendor agreed that if the purchase price and interest should be fully paid he would execute and deliver a warranty deed of the premises within a reasonable time after demand. The contract also provided that if the purchaser failed to make any of the payments as specified the agreement should thenceforth be "utterly void and of no effect and all payments thereon forfeited, subject to be revived and renewed" by the vendor or the mutual agreement of both parties. *Held*, that failure to make payments as specified did not render the agreement absolutely void so that no action at law could be maintained on it by the vendor, but gave the vendor an election to declare the contract void or to continue it in force and sue for the purchase price or for specific performance. *Shenners v. Pritchard*, 287

5. The action of the vendor in such case in deeding the land to a third person and assigning the contract to him, and the bringing of a suit by the assignee for the unpaid purchase money, are *held* to be an election to declare the contract still in force. *Ibid.*

6. The vendor and his assigns, not being bound by the contract to make their election within any given time, may exercise it at any time before they are cut off by the statute of limitations, where it does not appear that the vendees have suffered any injury or loss for which they might obtain relief in equity. *Ibid.*

7. The fact that the deed from the vendor in such case antedates the assignment of the contract is of no significance, unless it was shown that the conveyance by deed was an independent transaction and intended to cut off the vendees' rights. *Ibid.*

8. A clause in said contract imposing upon the vendor the duty of grading streets, etc., is *held* to be an independent covenant and not a condition precedent to a recovery of the purchase price. *Ibid.*

9. The covenant as to the giving of the deed being that the vendor will, after full payment and within a reasonable time after demand, execute and deliver the deed, tender of a deed before commencing action to recover the purchase price is unnecessary. *Ibid.*

10. Although the purchaser of real property, in the absence of proper covenants, generally takes it at his own risk and has no remedy in case of failure of title, yet, if the grantors occupy a fiduciary rela-

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tion to the grantee and the parties have acted in ignorance of, or under mistake as to, their antecedent legal rights, a court of equity may look into the transaction and grant relief. *Jenkins v. Bradley*, 540

VENDOR'S LIEN. See VENDOR AND PURCHASER, 1-3.

## VERDICT.

See APPEAL, 15, 17-19. COURT AND JURY. INSTRUCTIONS TO JURY, 6-8. INSURANCE, 7. JUDGMENT, 11. NEGLIGENCE, 1, 8. RAILROADS, 29. REPLEVIN, 5.

1. A change in one of the questions submitted for a special verdict, made after plaintiff's attorney had finished his opening argument to the jury, was not prejudicial to defendant, whose counsel had, thereafter, full opportunity to argue the question to the jury and to prepare suitable requests to instruct. *New Home S. M. Co. v. Simon*, 120
2. The object of a special verdict is to obtain a decision of issues of fact raised by the pleadings, not to decide disputes between witnesses or controversies over evidentiary facts. *Baxter v. C. & N. W. R. Co.* 307
3. The right to a special verdict is satisfied by a submission to the jury of a sufficient number of questions to cover, singly, every material fact in issue under the pleadings which is in dispute on the evidence. *Ibid.*
4. In preparing a special verdict, every material fact in issue by the pleadings, controverted on the evidence, affecting the rights of the parties in respect to the final result, should be covered by a question, and those facts from which any such issuable fact may be taken as inferable may properly be omitted, though questions covering such evidentiary facts may be added in the discretion of the court. *Ibid.*
5. Where the questions submitted for special verdict cover all the material issues involved, a refusal to submit more specific questions is not error. *Wunderlich v. Palatine F. Ins. Co.* 382

VESTED RIGHTS. See WILLS, 8.

## VOLUNTARY ASSIGNMENT.

See GARNISHMENT, 2.

Insolvent debtors gave a chattel mortgage covering substantially all their property to their largest creditor for himself and as agent and trustee for four other creditors. The mortgagee took immediate possession and proceeded to sell the property and distribute the net proceeds *pro rata* among the creditors so preferred, all of whom knew that the debtors were insolvent at the time the mortgage was given. *Held*, that the transaction amounted to an assignment for the benefit of creditors, in violation of the statute (sec. 1694, Stats. 1898), and that the mortgage was fraudulent and void as to the other creditors. *Leedom v. H. B. Claflin Co.* 103

WAIVER.
Of right to have facts passed on by jury. See COURT AND JURY, 2.
Of objections to jury. See CRIMINAL LAW, 17.
Of objections to hypothetical question. See CRIMINAL LAW, 21.
Of error, by failure to except. See CRIMINAL LAW, 27.
Of right to jury trial. See PRACTICE, 3.

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## WASTE.

1. A large dwelling-house built in 1864 in the city of Milwaukee had, as a result of the growth and development of the city, become surrounded by factories and railway tracks. It stood isolated, upon just enough ground to support it, from twenty to thirty feet above the level of the street, and was absolutely undesirable as a residence and incapable of any use as business property. In 1891 and 1892 the owner of a life estate, who stood in no contract relation to the reversioners, removed the building and graded down the land to about the level of the street, thereby largely enhancing the value of the property. *Held*, that this did not constitute actionable waste. *Melms v. Pabst Brewing Co.* 7

2. When there has occurred a complete and permanent change of surrounding conditions, which has deprived property of its value and usefulness as previously used, the question whether a life tenant, not bound by contract to restore the property in the same condition in which he received it, has been guilty of waste in making changes necessary to make the property useful, is a question of fact for the jury under proper instructions, or for the court when the question is tried by the court. *Ibid.*

## WATERS.

1. A flume and mill races below a dam constituted a reservoir from which, by virtue of a certain agreement and conveyances between the predecessors in interest of the respective parties, plaintiffs had the right to draw water for their flouring mill. The defendant city, having become the owner of the fee of a part of the land on which such flume and races were, threatened to fill them up on the land so acquired and across an adjoining public street. Such a reduction in the size and capacity of the reservoir would tend, at certain stages of the water in the river, to reduce the supply of water at plaintiffs' mill and impair the use of their property. *Held*, that the remedy at law would be inadequate and that plaintiffs were entitled to have such filling restrained by injunction. *Koenig v. Watertown*, 409

2. One landowner cannot lawfully collect the waters accumulating in a marsh or basin on his own land, and discharge them through an artificial channel upon or in close proximity to his neighbor's land, to such neighbor's permanent injury. *Nicolai v. Wilkins*, 580

3. By ch. 66, Laws of 1899, owners of land adjoining a lake were authorized to restore its waters to the natural flow and line thereof up to the meander line as indicated by the original government survey, and for that purpose to fill any ditch or outlet which had been dug or deepened since said survey. In an action to restrain the erection of a dam across the outlet of said lake, the complaint alleged ownership, use, and occupation by the plaintiffs and their grantors, for more than forty years, of lands abutting on the lake and the outlet, which would be overflowed and their value diminished by the construction of the dam, and their water supply along the outlet cut off, and that the construction of the dam was wrongful and done with the design to injure plaintiffs; but there was nothing alleged from which it might be inferred that the defendants were owners of land adjoining the lake, or that the outlet had ever been deepened, or that they were acting under said ch. 66. *Held*, that the complaint stated a cause of action entirely outside



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of said ch. 66, and that the constitutionality of that act was therefore not before the court. *Roberts v. Rust*, 619

4. Under the allegations of ownership, use, and occupation, for more than forty years, of lands abutting on the lake, it cannot be assumed that such lands are within the meander line. *Ibid.*

## WILLS.

1. A finding of the trial court that an alleged will was not procured by undue influence on the part of the testator's widow is *held* to be sustained by the evidence. *In re Goking's Will*, 28

2. Expenses of administration may be made a charge on the homestead by will, subject to widow's rights to be asserted at her election. *Mackin v. Madden*, 61

3. If a testator, by will, make debts and legacies a charge on his homestead, requiring its conversion into money for their payment, there being no other property out of which to pay the same or the expenses of administration, the payment of such expenses out of the fund derived from such sale will be deemed, by implication, to have been contemplated by the testator and made a charge upon such fund. *Ibid.*

4. A will, after giving to testator's wife "all my estate, both real and personal, during her natural life," proceeded: "I also devise and bequeath to her all rents, interest on money, and profits that may accumulate from any source, to be used by her for her special benefit during her natural life." The donation to the remaindermen was confined to "my estate." *Held*, that the gift of an absolute life estate in all the property was not curtailed by the subsequent provision, and that all accumulations of the income of the estate became the separate property of the widow. *Evans v. Kemp*, 87

5. Probate of a will was contested by testator's children on the ground that its execution was procured by the undue influence of his sister and brother-in-law, to whom, with others of his sisters and brothers, it gave equal shares with the children in his estate. A finding that the will was so procured is *held* not to be sustained by the evidence, which, among other things, negatives the existence of confidential relations between the testator and said sister and brother-in-law, wholly fails to show that they prejudiced him against his children or solicited or procured the making of a will favorable to themselves, or that the will was made in secret and other relatives excluded, and shows that, under all the circumstances, the testator's disposition of his property was perfectly natural, and that the will was his free, voluntary, and intelligent act. *Fox v. Martin*, 581

6. Secrecy in the making of a will is not a badge of fraud unless the circumstances are such as to suggest need of protection for the testator in order that he may express his own will instead of the will of some other person. *Ibid.*

7. Prior to the enactment of ch. 123, Laws of 1895 (providing that the widow shall be entitled to the share of her husband's estate as in cases of intestacy, in cases where no provision is made for her by will), the widow's right to share in her husband's personal estate in case no provision was made for her in his will was limited to the allowances for maintenance, etc., provided in subd. 1, 2, sec. 3935, S. & B. Ann. Stats. *Jochem v. Dutcher*, 611

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8. Although said ch. 123, Laws of 1895, is retrospective in its language, it cannot affect the distribution of the estate of a person who died before its enactment, since the rights of legatees become vested when the will is probated and relate back to the time of the testator's death. *Ibid.*

WITNESSES.
Right to list of. See CRIMINAL LAW, 26.
Competency. See EVIDENCE, 1, 5, 14.
To signature by mark. See JUSTICES' COURTS, 2. SIGNATURES.

WORDS AND PHRASES.
*Assigns* of contractor, in statute. See TAXATION, 8.
*Bitch.* See LIBEL AND SLANDER, 2.
*Demurrer*, in statute. See APPEAL, 2. PLEADING, 2.
*Executor*, in statute. See APPEAL, 21.
*Held in trust or on commission*, in policy. See INSURANCE, 8.
*Owned*, in statute. See TAXATION, 6.
*Party*, in statute. See EVIDENCE, 1.
By him *personally*, in statute. See EVIDENCE, 14.
*Premeditated design*, in statute. See CRIMINAL LAW, 16.
*Property of*, in statute. See TAXATION, 6.
*Proximate cause.* See NEGLIGENCE, 2.
*Services.* See HUSBAND AND WIFE, 2.
*Serving* a notice, in statute. See APPEAL, 5.
*Sold but not delivered*, in policy. See INSURANCE, 8, 9.
*Statement or bill of such claim*, in statute. See HIGHWAYS, 1.
*Very numerous*, in statute. See PARTIES, 2.
*Void*, in contract. See VENDOR AND PURCHASER, 4.
*Voluntary confession.* See CRIMINAL LAW, 24.

WRIT.
Of assistance. See RAILROADS, 4.
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Of *mandamus.* See RAILROADS, 4.

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